4th Civil No. G033782

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FARMERS INSURANCE EXCHANGE, TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY; and FARMERS NEW WORLD LIFE INSURANCE COMPANY,

Plaintiffs, Cross-Defendants, Respondents And Cross-Appellants,

vs.

BARBARA L. KANODE and CAROL KANODE,
as Conservator for Barbara Kanode,

Defendants, Cross-Complainants, Appellants and Cross-Respondents.

Appeal from the Orange County Superior Court
Honorable Charles Margines, Judge Presiding
Orange County Superior Court Case No. 00CC 04644

COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' OPENING BRIEF

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RESPONDENTS' BRIEF

INTRODUCTION

This appeal is governed by two established legal principles:

First, a party cannot tortiously interfere with a prospective economic advantage in its own relationships—in this case, relationships the defendant insurers had with their own agent (the plaintiff) and with their own policyholders.

Second, a trial court has broad discretion in granting a new trial. When a trial court orders a new trial on the ground of excessive contract damages, it may consider the maximum damages to which a plaintiff would have been entitled had the contract been terminated without cause, as specifically allowed in the contract.

Here, Barbara Kanode was an independent contractor insurance agent for a number of Farmers entities.[1] Her agency agreement allowed either party to terminate on 30 days notice with cause and on 90 days notice *without* cause.

Ms. Kanode became mentally incapacitated. She failed to show up at her agency for months at a time. She exhibited erratic and explosive

[1] Plaintiffs and cross-defendants Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company and Farmers New World Life Insurance Company are separate and distinct legal entities with differing ownership, governing boards and structures. They share common marketing, however, and often jointly contract with agents. For simplicity we refer to them here collectively as the "Farmers entities" or "Farmers." By doing so, we do not mean to in any way impugn the separate and distinct nature and existence of these entities.

behavior. She misplaced policyholders' premium payment checks, failed to timely deposit them, and risked cancellation of their coverages. Eventually, she was involuntarily hospitalized and had conservators appointed for her. Ultimately, this led the Farmers entities to terminate their agency relationship with her.

Ms. Kanode claims that the Farmers entities breached their agency agreement with her. She also contends that by terminating their relationship with her, the Farmers entities somehow interfered with some (unspecified) prospective economic advantage that she had. As damages she claims what she supposedly would have earned as a fully functioning agent for years into the future.

The jury agreed with Ms. Kanode. The trial court did not. It granted judgment notwithstanding the verdict as to Ms. Kanode's interference with prospective economic advantage claim and a new trial on her contract claim. The trial court was right to do so.

Controlling Supreme Court authority holds that interference liability *may not* be premised on the defending party's own contractual relationships. This means Ms. Kanode's interference claim had to be based on the Farmers entities' interference with some *non-Farmers* business or expectancy. But there is not one iota of evidence that Ms. Kanode had any specific such business or expectancy, let alone that the Farmers entities interfered with it.

Controlling Supreme Court authority also mandates that to be liable in tort, the Farmers entities must have engaged in independently wrongful conduct *beyond* just terminating their own contract. No matter how closely this Court scours the record, it will find no such evidence here. The trial court correctly granted judgment notwithstanding the verdict as to Ms. Kanode's interference verdict.

The trial court also acted well within its broad discretion in granting a new trial on the contract claim. It is undisputed that the agency agreement allowed either party to terminate without cause on 90 days notice. On-point authority holds that in such circumstances the *maximum* contract damages Ms. Kanode could recover were the earnings (i.e. commissions) she would have received for that 90-day period. Certainly, that is a logical factual inference for the trial court to have made. Under Ms. Kanode's own evidence, that would have amounted to no more than $13,334 in damages. There is no tenable reason for the jury's $268,125 award of contract damages. The trial court could reasonably conclude that award was plainly excessive.

The Farmers entities acted properly here. They concluded—with substantial justification—that their agent was not living up to their standards and that her erratic behavior posed a danger to their business interests and to the interests of their policyholders whose policies she serviced. In those circumstances, they had every right (indeed, an

obligation to their policyholders) to terminate their relationship with Ms. Kanode.

This Court should affirm the trial court's entry of judgment notwithstanding the verdict as to the interference claim. To the extent that this Court does not direct entry of judgment in the Farmers entities' favor on the contract claim (as argued in the accompanying cross-appeal, pp. 67-81, *infra*), it should also affirm the trial court's new trial order on that claim, as well.

STATEMENT OF FACTS

This case stems from the Farmers entities' termination of their agency agreement with Barbara Kanode on January 26, 2000.[2]

A. The Agent Appointment Agreement.

Ms. Kanode contracted with the Farmers entities to act on their behalf as an insurance sales agent under an Agent Appointment Agreement (the "Agreement"). (Appellant's Appendix ["AA"] 19-22.) Pursuant to the Agreement, Ms. Kanode sold and renewed Farmers entities' policies. (AA 19.) She also agreed to furnish insurance services to policyholders including "collecting and promptly remitting monies [*sic*] due the Companies, receiving and adjusting claims within [her] authority, notifying the Companies of all claims beyond that authority and [otherwise] servicing all policyholders . . . ." (*Ibid*.) All of the Farmers policies issued were executed by and between the Farmers entities and the policyholders. (Reporter's Transcript ["RT"] 2224-2225, 2931.) Under the Agent Appointment Agreement, Ms. Kanode was an independent contractor. (AA 22.)

The Agreement provided for termination either immediately, with thirty days written notice or with three months written notice as follows:

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[2] Unless otherwise indicated, we recite the *undisputed* facts, in accordance with the standard for reviewing the judgment notwithstanding the verdict as to the interference claim. (See *Trujillo v. North County Transit Dist*. (1998) 63 Cal.App.4th 280, 284.) Where there was contradictory evidence relevant to the trial court's new trial order as to the contract claim, we have so noted. As to that order, all controverted facts are construed in the Farmers entities' favor. (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412, 416.)

- “immediately by mutual consent or by the Companies” for five specified reasons, including “abandonment of the Agency”;
- upon 30 days written notice by *either* the agent or the Farmers entities if the Agent Appointment Agreement is breached by the other party;
- without cause “by *either* the Agent or the Companies on three (3) months written notice.” (AA 20, emphasis added.)

Upon termination, the agent was entitled to the following payments:

(1) Service commissions (i.e., commissions on existing policies that remain in force) earned between the time when the agent receives notice of termination and when the termination notice period ends (e.g., 30 or 90 days after notice of termination, depending on the grounds for the termination);

(2) New business commissions for new policies written between the time when the agent receives notice of termination and when the notice period ends (e.g., 30 or 90 days after notice of termination depending on the grounds for the termination); and

(3) A pre-set, liquidated sum—called “contract value”—calculated according to a formula dependent upon years as an agent, active policies, and recent service commissions. (AA 20-21.)

"In the event [the] Agreement is terminated by the [Farmers entities], the Agent may within ten (10) days of receiving notice of termination request a review of the termination by [a] termination review board." (AA 20; RT 1409-1410, 1506, 3077-3078.) If the termination review board ("TRB") believes that the termination was inappropriate, it can *recommend* that the agency be reinstated. (AA 20; RT 1461-1462, 1506.) The TRB's recommendations are not binding on the Farmers entities. (AA 20; RT 1461-1463.)

B. Ms. Kanode's Erratic Behavior, Conservatorships And Hospitalizations.

Beginning in 1997, Ms. Kanode began exhibiting erratic behavior and problems in running her agency. (RT 1101-1102; Exhibits 6, 8, 11, 13, 17, 23, 28, 29, 45, 58.) For instance, Ms. Kanode failed to deposit policyholders' insurance premium checks, a serious lapse that might have left insureds without coverage or have led the Farmers entities to erroneously deny coverage. (RT 1341-1342, 1885-1886, 2455, 2467-2470, 2944-2945, 3006; Exhibit 30.) Various such checks were eventually located in Ms. Kanode's car. (RT 1341, 1882.)

Ms. Kanode also failed to attend to her agency for months at a time. For example, she was entirely absent from her office for most of December 1999 and January 2000. (RT 3459-3460 [Ms. Kanode concedes she was in the office on only one day in January 2000]; 3465 [Ms. Kanode concedes

she was in the office only 3 days between December 1-10, 1999]; 2119 [Ms. Kanode was hospitalized for four weeks in December 1999].)

Ms. Kanode's bizarre behavior, as noted by her district manager (Merrill Jessup), included saying that she had a great singing voice and was going to be working in show business (RT 1801-1802; Exhibit 6); telling him that she was going to be a race car driver (RT 1802); telling him that her father was an alcoholic child abuser (RT 1280-1281, 1803); being evicted from the hotel where she was living because she was caught swimming naked in the jacuzzi at 2:00 a.m. (RT 1271); causing a disturbance at a car dealership by dressing in a bizarre fashion and trying to purchase three cars (RT 1234-1235); dressing in inappropriately revealing clothing (RT 1282-1285); and bouncing personal checks (RT 1321, 1329).

Ms. Kanode disputes that many of these incidents occurred. (See, e.g., RT 2432-2433 [denying she ever dressed up as Minnie Mouse and tried to purchase three cars from a car dealership]; 2489 [denying she said she planned to become a race car driver and that her father was an alcoholic child abuser]; 2497 [denying she was evicted for swimming naked in jacuzzi].)

Ms. Kanode's co-workers also observed her erratic behavior, including failing to cover her agency (RT 3102, 3259, 3334); failing to return policyholder phone calls (RT 3272-3277); cursing at and verbally abusing the receptionist (RT 3335, 3380-3382); allowing her voicemail box to fill to capacity (RT 3279); wearing "very short skirts, shear [*sic*] blouses,

low cut, very tight" (RT 3257); and becoming "very emotional. She would cry. She would be loud. Very dramatic" (RT 3262). They expressed concerns to Mr. Jessup about Ms. Kanode "going postal" and shooting them. (RT 1219.)

A number of Ms. Kanode's co-workers also found it necessary to respond to complaints by the Farmers entities policyholders that Ms. Kanode was supposed to be servicing. (See, e.g., RT 334-336, 3103-3115, 3139, 3302-3313, 3317-3322; Exhibits 19, 23, 25, 41, 52, 53, 60.)

One of Ms. Kanode's policyholders—Rick Criner—observed behavior by Ms. Kanode that made him lose confidence in her abilities as an agent. (RT 2984.) That behavior included begging him not to cancel an insurance policy, requiring him to meet her in person to do so, acting oddly at a meeting, wearing lipstick that "was off on one side of her lip" and looking disheveled. (RT 2978-2984, 2989; see also Exhibit 19 [memorandum documenting Mr. Criner's complaint].)

Unbeknownst to the Farmers entities, Ms. Kanode was placed under a court-ordered conservatorship for four months in 1997-1998. (RT 2780.) During the period from January 2000 through March 2001, Ms. Kanode was again repeatedly placed under conservatorship, first with a public guardian appointed by the court, and then with her mother as conservator. (Exhibits 48, 62, 63, 85, 93, 94.) The terms of the conservatorships made it clear that Ms. Kanode was "gravely disabled" and that the conservator therefore had

the right to impose detention in a medical facility and involuntary medical treatment. (Exhibits 48, 63, 93; see also pp. 68-71, *infra*.)

Ms. Kanode was involuntarily admitted to the hospital under Welfare and Institutions Code section 5150 for six weeks in 1997 (RT 2760-2763) and again for four weeks in December 1999 (RT 440, 2119). In early 2000, she was again placed back into an involuntary hold and admitted to a hospital. (RT 2514-2516, 2518, 3458.)

Ms. Kanode's January 2000 hospitalization ended when she was ordered released pursuant to a writ of habeas corpus. (RT 513, 2394.) Ms. Kanode's parents disagreed with the court's order releasing their daughter and wrote a letter to explain to the court that their daughter "was sick, and they shouldn't be letting someone out of the hospital that was not capable of coming out. . . . We didn't think she was stabilized." (RT 526-527; see also RT 513-514.) By February 15, 2000, a public guardian had again been appointed as her conservator, based on a February 2, 2000 medical declaration that she was gravely disabled. (Exhibits 62, 63.)

The Farmers entities were unaware of the conservatorships and, although they became aware that Ms. Kanode was hospitalized in 2000, they were unaware of the anticipated length of her hospitalization. (See RT 739, 1904-1905, 1966, 2233-2234, 2238.)

C. Ms. Kanode's Parents Attempt To Have Another Act In Ms. Kanode's Stead.

In December 1999, after being confronted with the problems caused by Ms. Kanode' prolonged absence from her agency, Ms. Kanode's parents hired Masood Khan to operate her agency. (RT 457, 1767.) Mr. Khan did not have any appointment with the Farmers entities and was not authorized to act on their behalf; indeed, he had previously failed to complete a reserve agent program with the Farmers entities. (RT 2308-2309, 2937-2941; see also Exhibit 44; RT 1355, 2296-2299, 2302-2305.) The reserve agent program is a training and probationary program for prospective new agents. (RT 2296.) Mr. Khan's supervisor during his uncompleted reserve agent program noted that Mr. Khan had engaged in questionable practices, such as misleading the Farmers entities and customers regarding rates and premiums. (RT 2304-2307, 2318, 2323; Exhibit 5; see also RT 2311-2312.)

The Farmers entities ultimately concluded that Mr. Khan was unqualified to run Ms. Kanode's agency in her absence without supervision by an appointed agent. (RT 2939-2941; see also RT 885, 888-889, 891, 1144-1145, 1769-1771, 2311-2312.) They declined to accept him as a substitute for Ms. Kanode. (*Ibid*.)

D. The Economics Of Ms. Kanode's Agency.

The uncontradicted evidence was that Ms. Kanode's book of business began diminishing in 1997, when she first manifested erratic behavior, well before termination of her agency was even contemplated.

(RT 3175-3176.) Between 1997 and December 1999, her overall number of policies written decreased by some 200 policies to 874 total policies. (RT 3172-3174.)

According to Ms. Kanode, by January 2000, she was earning approximately $80,000 per year as a Farmers entities agent. (RT 2286-2287.) She testified that her declining book of business resulted, in part, from her decision to shift her sales efforts away from automobile insurance and towards homeowners insurance. (RT 2355:12-26; see also RT 2277-2278, 2347-2349, 2352.)

E. The Farmers Entities Terminate Ms. Kanode's Agency.

The Farmers entities became increasingly concerned about Ms. Kanode's extended absences and her ability to operate her agency. (RT 2915-2916, 2922, 3022, 3028.) Corey Braun (Division Marketing Manager) was unable to contact Ms. Kanode. (RT 695, 876, 1038; see also Exhibit 27.) Despite several attempts to contact her, he received a call from her only once in late December 1999, but that the conversation was unproductive as Ms. Kanode's thought processes appeared to be disjointed. (*Ibid*.)

The Farmers entities decided to terminate Ms. Kanode for cause, specifically for failure to conform to good business practices (a termination for which the Agreement mandated 30 days notice). (RT 842; see also Exhibit 35.) They terminated Ms. Kanode's agency by written notice on

January 26, 2000. (RT 998, 2379, 2922; Exhibit 50; see also RT 2144-2145; Exhibit 59.)

F. The Post-Termination Actions.

1. The Farmers entities pay, and Ms. Kanode accepts without complaint, one month's commissions and the contractually defined "contract value" payment.

Upon terminating the Agent Appointment Agreement, the Farmers entities paid Ms. Kanode one month's additional commissions (i.e., through February 2000), consistent with their view that the termination was a 30-day notice, for-cause termination. (RT 2888-2889.) At the time of her termination, Ms. Kanode claimed that she was making approximately $80,000 per year, or roughly $7,000 per month, in commissions. (RT 2286-2287.) It is undisputed Ms. Kanode accepted payment of one month of service commissions without protest. (RT 1906-1907, 1965-1966, 2888-2889, 2918-2920.) The commissions were only for the service of existing policies. There is no evidence that Ms. Kanode sold any new policies during this period. For most of that time she was involuntarily hospitalized.

In addition to the one-month's commissions, the Farmers entities paid Ms. Kanode her agency's "contract value" of $42,712 calculated according to the Agreement's formula. (RT 2881-2882; Exhibit 89.) It is undisputed that Ms. Kanode cashed the contract-value checks. (RT 2531.)

2. Ms. Kanode's abortive termination review board hearing.

Ms. Kanode requested a hearing by a termination review board ("TRB") to review the termination decision. (RT 1000; Exhibit 65.) The Farmers entities scheduled a TRB hearing for March 15, 2000. (Exhibit 73.) The scheduled hearing was cancelled, however, when Ms. Kanode's counsel could neither ensure that Ms. Kanode would be available for the hearing due to her hospitalization, nor provide any indication as to when she would be available to attend in the future. (RT 1394-1398, 1416, 1496-1497, 1521; Exhibits 77, 78, 82.)

3. The Farmers entities notify their policyholders that Ms. Kanode is no longer a Farmers entities' agent.

After the Farmers entities terminated their agency relationship with Ms. Kanode, district manager Jessup drafted, and a Farmers entities' sales agent assigned to service policies which had formerly been in Ms. Kanode's agency sent, a letter to Ms. Kanode's former customers. That letter informed policyholders that "[y]our personal Farmers agent, Barbara Kanode, has felt it necessary to leave her agency in Mission Viejo last month. Because of this decision, her agency records are being reassigned." (Exhibit 88.)

4. Ms. Kanode retains possession of the Farmers entities' policyholder files for six months, until she is ordered by the court to return them.

Despite her termination, Ms. Kanode refused to return the policyholders' files to the Farmers entities. (RT 1500-1502; see AA 22.) She was in full possession and control of the policyholder files for six months following her termination. (RT 2586.)

The trial court eventually issued an order requiring Ms. Kanode to return the files to the Farmers entities. (Exhibit 133; see also RT 2008-2010.) That order expressly provided that the policy files were the "confidential property of Farmers" and precluded Ms. Kanode from thereafter reviewing or duplicating them. (Exhibit 133.)

Although ordered by the trial court to return the files, Ms. Kanode's father locked up the files and refused to comply with the court order. (RT 2537-2538.) Eventually, the Farmers entities regained possession of the files. (RT 1956, 3039.)

PROCEDURAL HISTORY

A. The Complaint And Cross-Complaint.

The Farmers entities sued Ms. Kanode for breach of contract, conversion and intentional interference with prospective economic advantage in an attempt to obtain the return of their policyholder files. (Respondents' Appendix ["RA"] 1.) Ms. Kanode cross-complained for

slander, libel, interference with prospective economic advantage, intentional interference with contractual relations, violation of the Fair Employment And Housing Act ("FEHA"), violation of the Americans With Disabilities Act ("ADA"), breach of contract and punitive damages. (AA 1-16.)

Before trial, the trial court dismissed the FEHA and the ADA claims. (RA 35-36; RT 8-9.)

B. The Trial.

The trial court dismissed, on nonsuit, Ms. Kanode's claims for slander, libel, intentional interference with contractual relations, and for punitive damages. (RT 2638, 2656, 2677.) The remaining two claims—i.e., for interference with prospective economic advantage and breach of contract—proceeded to trial.

1. Plaintiff's theory: the Farmers entities undercut her agency.

At trial, Ms. Kanode speculated that the Farmers entities had been acting to undercut her agency by siphoning business to other agents. Her "evidence" was that in recent years (coinciding with her mental health issues), her overall number of policies written had decreased by some 200 policies. (RT 2152.) Over the Farmers entities' hearsay objections, she testified that policyholders had told her that the Farmers entities had been transferring her files to other agents before her termination. (RT 2579.)

The file of the only *specific* policyholder that Ms. Kanode identified as being taken from her, a Mr. Alexander (RT 2504), was not transferred

before her termination. (See RT 342, 3397-3398.) Only one file was transferred prior to Ms. Kanode's termination. (RT 3357.) And that file was transferred pursuant to that policyholder's own written request to be assigned to another agent. (*Ibid*.)

Ms. Kanode presented no evidence as to what portion of her diminished book of business resulted from the alleged siphoning of her business to other agents, as opposed to other causes (e.g., her marketing shift towards homeowners policies).

2. Ms. Kanode belatedly disputes her contract value payment.

Before trial, Ms. Kanode, under oath, had no dispute with the calculation of her contract value. (RT 2527-2529.) At trial, however, she claimed that the contract value was wrongly calculated; she asserted that it was improperly based on a diminished book of business caused, in part, by the transfer of files from her agency to others. (RT 2150-2152.)

3. Jury instructions.

The trial court instructed the jury that it could determine that a TRB hearing was a condition to terminating the contract. (RT 3716.) The trial court did not instruct the jury that either (1) Ms. Kanode's acceptance of the contract value could satisfy, wholly or partially, any contract breach; or (2) Ms. Kanode's legally-declared incapacity and commensurate inability to write new policies, as a matter of law, prevented her contract performance during her conservatorship or incapacity.

C. Jury Verdict.

The jury found breach of contract and awarded $268,125 in damages—more than three times Ms. Kanode's $80,000 annual commission income at the time of the termination of her agency. (AA 138, see pp. 11-12, *supra*.)

The jury also found interference with prospective economic advantage, awarding the same $268,125 as economic loss plus and an additional $400,000 for emotional distress. (AA 140; see also AA 141.)

The trial court entered judgment on November 17, 2003. (AA 137.)

D. The Trial Court Grants In Part And Denies In Part Defendants' Post-Trial Motions.

The Farmers entities moved for judgment notwithstanding the verdict and a new trial as to both of Ms. Kanode's claims. (AA 69.) The trial court granted the motion for judgment notwithstanding the verdict as to the interference claim, but denied it as to the contract claim. (AA 319.)

In granting judgment notwithstanding the verdict as to the interference claim, the trial court relied on three separate grounds:

(1) The absence of any evidence that the Farmers entities did something independently wrongful to disrupt Ms. Kanode's relationship with any non-Farmers clients or non-Farmers business;

(2) The absence of any evidence that the Farmers entities engaged in any conduct designed expressly to disrupt her non-Farmers business; and

(3) The absence of any evidence showing the existence or extent of any economic harm stemming from the alleged interference with her non-Farmers business. (AA 319.)

The trial court also concluded that the award of emotional distress damages on the interference claim independently "cannot stand as a matter of law because 'the defendant's tortious conduct has resulted only in economic injury to the plaintiff." (*Ibid*., citing *Erlich v. Menezes* (1999) 21 Cal.4th 543, 555.)

The trial court granted the motion for a new trial with respect to all claims. (AA 320.) In its view, the damages were excessive because they (1) greatly exceeded the amount due under the contract for a termination without cause, and (2) appeared to be based on a finding that Ms. Kanode's termination was not final until she had a TRB hearing. (AA 320-321.) The trial court reasoned as follows:

- There was no reason for the jury to assess damages exceeding what the Farmers entities would have had to pay upon 90 days notice for a termination without cause. (AA 320-321.) The proper measure of damages was "the amount of money [the breaching party] would have to pay in exercising his election to terminate [the contract]," without cause. (AA 321, internal

quotation marks omitted.) "To award her any more than that would be to place her in a better position than she would have been entitled to had Farmers not breached its contract with her." (*Ibid*.)

- The trial court rejected "[a]ny implied finding by the jury that Ms. Kanode's termination was not final until some three and one-half years after she was given a letter of termination and that Ms. Kanode still had the right to demand a termination review board hearing." (AA 320.) Any such an implied finding was "not supported by the evidence, the law, or by logic." (*Ibid*.) The trial court further concluded that "Farmers' requirement that a terminated agent attend the termination review board hearing was reasonable[;] . . . Farmers afforded Ms. Kanode, through her counsel, ample opportunity to avail herself of the procedure" and "Farmers acted reasonably in calling off the hearing when Ms. Kanode's counsel indicated that her client was not available for the hearing and could not provide a date by which Ms. Kanode would be so available." (*Ibid*.)

The trial court's order was silent as to the other statutory grounds raised in the Farmers entities' moving papers for a new trial. (AA 320-321; see AA 61-62.)

The trial court ordered a new trial unless Ms. Kanode accepted a remittitur of $13,334.00. (AA 321.) Ms. Kanode declined. (RT 3934.)

E. Statement Of Appealability.

Ms. Kanode timely appealed the trial court's order granting judgment notwithstanding the verdict as to the interference claim and a new trial. (AA 296.)

ARGUMENT

I. AS A THRESHOLD MATTER, THIS COURT SHOULD DISREGARD MS. KANODE'S UNSUPPORTED AND FALSE RENDITION OF THE FACTS; ON THAT BASIS, THE POST-TRIAL ORDERS SHOULD BE AFFIRMED.

In her factual recitation, Ms. Kanode consistently fails to cite the appellate record. (See AOB 1-14.) Nor does the appellate record support her factual assertions. Accordingly, this Court should disregard her "facts" and the arguments premised by her hypothesized facts.

Where a party's brief "fail[s] to provide any citations to the record to support any of the assertions as to what the record shows . . . . [the reviewing court] need not consider the matter." (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239; see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 ["'This court is not required to discuss or consider points . . . which are not supported by citation to authorities or the record'"]; Cal. Rules of Court, rule 14 (a)(1)(C) ["Each brief must . . . support any reference to a matter in the record by a citation to the record"].) "'[I]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived.'" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246, quoting *Duarte v. Chico Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

Ms. Kanode's disregard of the record leads her to make outrageous, scurrilous statements for which there is not one iota of evidentiary support.

Various "facts" or supposed direct quotes from witnesses accusing the Farmers entities of underhanded tactics have no evidentiary grounding whatsoever and are simply ipse dixit. (See, e.g., AOB 6-7 [Bernard Shultz states "'It's not abandonment. We have to find something else'" to justify terminating Ms. Kanode]; AOB 7 ["Schultz knows Farmers cannot make abandonment stick. So he suggests a different tactic. The only thing we can go on is 'bad business practices'"]; AOB 4 [district manager "Jessup does not get along with Ms. Kanode"]; AOB 5 ["Jessup accuses Ms. Kanode of embezzling checks from Farmers"]; *ibid*. [Jessup "threatens not only to terminate Ms. Kanode's agency, but to have her arrested for stealing the checks"]; AOB 6 [Shultz "wants to be sure the termination (of Ms. Kanode) succeeds"].)

Even in the rare instances where Ms. Kanode cites the record, she misrepresents it. For example, Ms. Kanode accuses her district manager (Merrill Jessup) of engineering her arrest and causing her hospitalization. (AOB 12.) Her sole citation for this accusation is to a letter that Mr. Jessup wrote to his supervisor about Ms. Kanode. (See Exhibit 58.) But the portion of the letter Ms. Kanode quotes refers to what *her own father* did; *not* what her district manager did. In the letter, Mr. Jessup writes:

> "Monday morning, her father told me, 'I just hope Barbara hasn't done something irreparable this time. The judge that let her out last week should never have released her. I called the presiding judge of Orange County to protest the judge's decision, and when she came to our house, I notified the court and she was picked up.'"

(Exhibit 58.) In other words, Ms. Kanode falsely attributes a quote to *her district manager* that, in fact, was attributable to *her father*. In so doing, she flagrantly misstates the record.

These examples are just the tip of the iceberg. Ms. Kanode makes up quotes and facts with alarming regularity. By failing to provide accurate record citations, Ms. Kanode has waived the arguments proffered in her opening brief.

At the very least, given Ms. Kanode's penchant for misrepresenting the record, this Court should ignore Ms. Kanode's rendition of the facts where those "facts" are unsupported by citations or where the record citations do not support the facts stated.

II. MS. KANODE HAS NOT ARGUED, AND THEREFORE HAS WAIVED, ANY ERROR REGARDING THE DISMISSAL OF HER FAIR EMPLOYMENT AND HOUSING ACT AND AMERICANS WITH DISABILITIES ACT CLAIMS AND THE NONSUIT OF HER DEFAMATION, INTERFERENCE WITH CONTRACTUAL RELATIONS AND PUNITIVE DAMAGES CLAIMS.

Prior to trial, the trial court dismissed Ms. Kanode's FEHA and ADA claims. (RA 35-36; RT 8-9.) On nonsuit, it dismissed her claims for slander, libel, interference with prospective contractual relations and punitive damages. (RT 2638, 2656, 2677.) Ms. Kanode has not challenged those rulings on appeal and, thus, they have become final. (See *Shaw v.*

Hughes Aircraft Co. (2000) 83 Cal.App.4th 1336, 1345, fn. 6 ["an appellant's failure to raise an issue in its opening brief waives it on appeal"]; see also *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1016, fn. 5; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 137, 148.)

The only claims at issue on appeal are the two that went to verdict: interference with prospective economic advantage and breach of contract.

III. THE TRIAL COURT PROPERLY GRANTED JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE CLAIM.

A party cannot tortiously interfere with its own contractual relationships. But that's all that was ever at issue here—namely, the Farmers entities' contract relationships with Ms. Kanode and their own policyholders.

Even if there were something more than that here, governing law requires interference liability to be premised on some "independently wrongful" act intended to disrupt and actually disrupting some relationship between others to which the defendant is a stranger. But there was no evidence of that here either.

Accordingly, the trial court properly granted judgment notwithstanding the verdict as to the interference verdict.

A. The Trial Court Applied The Proper Standard In Granting Judgment Notwithstanding The Verdict.

As a threshold matter, Ms. Kanode argues that the trial court applied the wrong standard for judgment notwithstanding the verdict, weighing the evidence instead of drawing all inferences in her favor. (AOB 16-19.)

This is wrong.

The trial court applied the proper standard. It explicitly "resolved conflicts in the evidence in favor of responding party (Ms. Kanode) and against the moving party (Farmers); and [drew] all reasonable inferences against the moving party and in favor of responding party." (AA 319, citing *Fountain Valley Chateau Blank Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750 ["*Fountain Valley*"].)

Ms. Kanode latches on to the trial court's statement that "there is simply no credible, substantial evidence that Farmers engaged in [interfering] conduct" and argues that because the trial court used the word "credible," it must have weighed the evidence. But, read in context—including the trial court's express statement that it was making all credibility assumptions and factual inferences in favor of Ms. Kanode—the court's statement clearly means that there was no *even potentially credible* evidence supporting the interference verdict.

In any event, this Court reviews the trial court's grant of judgment notwithstanding the verdict de novo, applying the same standard the trial court uses—namely, construing evidence and inferences in favor of

Ms. Kanode. (*Trujillo v. North County Transit Dist.*, *supra*, 63 Cal.App.4th at p. 284.) Thus, whether the trial court applied the wrong standard (it did not) is of no moment.

As we now show, judgment notwithstanding the verdict was compelled by the established law governing interference claims, as applied to the *undisputed evidence* here.

B. The Trial Court Properly Held That The Farmers Entities Cannot Be Liable For Disrupting Ms. Kanode's Prospective Economic Relationship With Their Own Policyholders Because They Were Not Strangers To Those Relationships.

A party cannot be liable for intentionally interfering with a prospective economic advantage of which it is an integral part. That is bedrock law. Thus, the Farmers entities cannot be liable for interfering with any prospective business stemming from their own contractual relationships either with Ms. Kanode or with their own policyholders.

The California Supreme Court's decision in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, is controlling and directly on point. It holds that a party to a contract cannot be liable for interfering with its own contractual relations. *Applied Equipment*'s principles apply equally to a claim for interference with a prospective economic advantage, which also "*can only be asserted against a stranger to*

the relationship." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 262, emphasis in original.)

Ms. Kanode nowhere mentions *Applied Equipment*, despite the fact the Farmers entities cited it extensively below (see AA 92-93, 99, 185) and despite the fact that it is directly analogous to the present case. In *Applied Equipment*, a general contractor hired plaintiff to act as its agent to procure certain equipment from a manufacturer agreeing to pay a commission. The general contractor later obtained the equipment directly from the manufacturer, thereby reducing the commissions owed to plaintiff. Plaintiff sued both the general contractor and the manufacturer for breach of contract and tortious interference with its commission agreement.

The Supreme Court held that the manufacturer *could not be liable* for interfering with its own contract. (7 Cal.4th at pp. 517-518.) Specifically, "[t]he tort duty not to interfere with the contract falls *only on strangers*—interlopers who have no legitimate interest in the scope or course of the contract's performance." (*Id*. at p. 514, emphasis added.) "[T]he tort cause of action for interference with a contract does not lie against a party to the contract." (*Ibid.*)

And, so it is here.

Indisputably, the Farmers entities were anything but strangers to the relationship between Ms. Kanode and the Farmers policyholders; the Farmers entities—*not* Ms. Kanode—were the contracting parties with the policyholders. (RT 1979-1980.) All of Ms. Kanode's dealings with the

Farmers entities' clients under the Agent Appointment Agreement were conducted *on behalf of those entities*. (See *Charles B. Webster Real Estate v. Rickard* (1971) 21 Cal.App.3d 612, 618-619 ["the essence of an agency" is that "the employee is authorized to deal on behalf of the employer with third parties"].) Likewise, the Farmers entities were parties to their own Agent Appointment Agreement with Ms. Kanode.

Thus, the only possible interference here had to involve some business that Ms. Kanode had outside of being a Farmers entities agent.

C. Ms. Kanode Failed To Prove Any Of The Elements Of Her Interference Claim.

Ms. Kanode presented *no* evidence whatsoever as to any interference, let alone tortious interference, with any identifiable non-Farmers business, independent of the Farmers entities' termination of their contract with Ms. Kanode. This dooms her claim. Interference with prospective economic advantage requires proof of each of the following elements: (1) a business relationship to which the defendant is a stranger, (2) conduct intended to disrupt that relationship, (3) which conduct is independently wrongful, (4) resulting in actual disruption of the relationship, and (5) ascertainable damages caused by the disruption. (See *Della Penna v. Toyota Motor Sales, U.S.A., Inc*. (1995) 11 Cal.4th 376, 389-390.)

As we now discuss, there is no record evidence of *any* of these elements here, let alone the requisite all of them.

1. There is no evidence that Ms. Kanode had any specific, quantifiable non-Farmers business.

Without ever citing the record, Ms. Kanode argues that the Farmers entities interfered with some separate business relationship that she had with the Farmers entities' policyholders. (AOB 19-20.) She vaguely asserts that she "was free to write insurance from other carriers if the coverage did not conflict with coverage Farmers offers" and that she "wrote policies for her clients with other companies." (AOB 19.) But, she provides no specificity and no record citations. (See pp. 21-23, *supra*; *City of Lincoln v. Barringer*, *supra*, 102 Cal.App.4th at p. 1239.)

In fact, nothing in the record supports Ms. Kanode's allegation that she had any *identifiable*, *quantifiable* non-Farmers business that she might have conducted with Farmers policyholders (or anyone else, for that matter) independent of her status as a Farmers entities agent.

2. There is no evidence that the Farmers entities engaged in any conduct expressly designed to disrupt Ms. Kanode's non-Farmers business.

Assuming for the sake of argument the existence of some non-Farmers business relationships, the Farmers entities must have engaged in conduct *expressly designed* to disrupt those relationships in order to be liable for intentionally interfering with such relationships. Incidental disruption is *not* enough. "[T]he essential thing is the purpose to cause the [interference]. If the actor does not have this purpose, his conduct does not

subject him to liability under this rule even if it has the unintended effect of deterring the third person from dealing with the other." (*Kasparian v. County of Los Angeles*, *supra*, 38 Cal.App.4th at p. 261, emphasis omitted.) "It is not enough that the actor intended to perform the acts which caused the result—he or she *must have intended to cause the result itself*." (*Ibid*.) "[T]o prevail on a cause of action for intentional interference with prospective economic advantage, plaintiff must plead and prove 'intentional acts on the part of the defendant *designed to disrupt the relationship*.'" (*Id.* at p. 262, emphasis omitted and added.)

Ms. Kanode made no such showing here. She fails to cite a single instance of an act by the Farmers entities *designed* to interfere with her non-Farmers relationships. Nor is there any evidence in the record of any such act. In fact, there isn't even evidence that the Farmers entities *knew* of any such business relationships (relationships that to this day have not been identified with any specificity).

The letter sent to the Farmers entities' policyholders advising them that their files had been assigned to a new agent was carefully worded to *protect* Ms. Kanode's reputation. As the trial court correctly observed, the letter sent to the policyholders was kinder than the truth. (RT 2636-2637.) That letter explained that "[y]our personal Farmers agent, Barbara Kanode, has felt it necessary to leave her agency in Mission Viejo last month. Because of this decision, her agency records are being reassigned." (Exhibit 88.) Mr. Jessup, the author of the transfer letter, testified without

contradiction that he was trying to protect Ms. Kanode and her reputation. (RT 2198.) Likewise, Karen Wood, the agent who signed the transfer letter, testified that she only wanted to advise policyholders that she was their newly-assigned agent and did not send the letters to harm Ms. Kanode in any way. (RT 412; Exhibit 88.)

In sum, there is no evidence that anyone wanted to interfere with Ms. Kanode's (for all this record shows, non-existent) non-Farmers business. Nor is there any claim that anyone did anything intentionally designed to interfere with that business. To the extent that terminating Ms. Kanode's Farmers entities agency *incidentally* affected her ability to write insurance for other companies, that is not enough.

3. There is no evidence of any "independently wrongful" action by the Farmers entities.

Assuming for the sake of argument that there was some evidence that the Farmers entities intentionally sought to interfere with some identifiable quantity of non-Farmers business, Ms. Kanode still has no tort claim. This is so because in order to establish tortious interference, a plaintiff has to show more than just interference, she must show some *independently wrongful* conduct.

Della Penna v. Toyota Motor Sales, U.S.A., Inc., *supra*, 11 Cal.4th 376, sets the controlling standard. There, plaintiff automobile wholesaler re-exported cars to Japan in violation of its distributor's "no-export" policy. (11 Cal.4th at pp. 379-380.) As a result, the distributor refused to make cars

available to plaintiff. The wholesaler sued claiming intentional interference with prospective economic advantage, stemming from the refusal to sell him cars with the intent of stopping his re-export business.

The Supreme Court held that there was no interference claim because the distributors' conduct in refusing to deal—although undoubtedly intended to disrupt the wholesaler's re-export business—was not independently wrongful: "[A] plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'" (*Id*. at pp. 392-393.) The conduct must be "'wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.'" (*Id.* at p. 385, quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.* (1978) 283 Or. 201 [582 P.2d 1365, 1371]; *San Francisco Design Center Associates v. Portman Companies* (1995) 41 Cal.App.4th 29, 42-43 [wrongful conduct supporting the interference verdict must "violate[] a statute or constitute[] a tort such as fraud or unfair competition" and be "independently actionable"].) Again, Ms. Kanode fails to mention, let alone distinguish on-point Supreme Court authority; she fails to even cite *Della Penna*.[3]

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[3] As with *Applied Equipment*, the Farmers entities relied on *Della Penna* in the trial court. (AA 92-93, 97-99.) And, the trial court expressly relied on *Della Penna* in its order granting judgment notwithstanding the verdict. (AA 319 [noting that there was simply no evidence of any "independently wrongful act by Farmers," citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, *supra*, 11 Cal.4th at p. 393].)

There is no hint of the required independently actionable wrongful conduct here. Breach of contract *cannot* serve as the basis for an interference with prospective economic advantage verdict. (*Della Penna, supra,* 11 Cal.4th 376.) Thus, any allegedly wrongful conduct has to be *independent* of any alleged breach of contractual obligations not to undermine Ms. Kanode's policy sales, to give her notice, to pay amounts due, or to afford a review board hearing. Such conduct cannot support the interference verdict because it stems from the alleged contract breach and therefore does not meet the necessary requirement of being "independently actionable." (*San Francisco Design Center Associates, supra,* 41 Cal.App.4th at p. 43.)

The trial court granted a nonsuit on Ms. Kanode's defamation claims (a decision Ms. Kanode has not challenged on appeal). What is left? In the trial court, Ms. Kanode identified only four acts she alleged constituted interference: (1) not allowing her to assign her agency, (2) transferring her Farmers entities files to other agents, (3) notifying Farmers entities' policyholders that she no longer was a Farmers entities agent, and (4) obtaining a court order for the return of the Farmers entities' policyholder files. All four acts, however, were part and parcel of the Farmers entities' contractual relationship with Ms. Kanode and its termination. None were independently wrongful in the sense required by *Della Penna*.

1. At trial, Ms. Kanode claimed that *the contract* permitted her to find a replacement to do her job and that the Farmers entities breached *the contract* by preventing her from doing so. (RT 3736, 3742; see also AA 3-4.) Interfering with the other party's ability to perform or to reap the benefits of the contract is a classic contract breach. (*Applied Equipment Corp.*, *supra*, 7 Cal.4th 503.) Indeed, nothing could be more integral to the contract relationship itself than whether one party interfered with the other's ability to perform or whether the duty of performing the contract could be assigned to another person. There can be nothing independently wrongful with such conduct beyond breach of contract.

2. Ms. Kanode claimed that Farmers breached *the contract* by assigning her files to new agents. (RT 3736, 3752-3753.) Again, this concerns contract performance, and is not an *independently* wrongful act.

3. At trial, Ms. Kanode took the position that the post-termination notification letter sent to Farmers' policyholders, informing the policyholders that new agents were assigned to their files, interfered with her non-Farmers business advantage. (AA 158, 172.) But, as the trial court recognized, the transfer letter was a necessary concomitant of the termination of Ms. Kanode's agency. (See AA 319.) The letter cannot be separated from the *contractual* termination and thus cannot properly serve as a basis for the interference verdict. Indeed, it is absurd to suggest that a principal acts wrongfully or tortiously in truthfully telling its own customers that someone is no longer its agent. The trial court's nonsuit of

Ms. Kanode's slander and defamation claims confirms that there was nothing independently wrongful in the Farmers entities' actions.

In any event, the letters were "[a] privileged publication or broadcast is one made . . . [i]n a communication, without malice, to a person interested therein, (1) by one who is also interested . . . ." (Civ. Code, § 47, subd. (c).) A company's letter informing its clients about an agent's termination falls squarely within the privilege.[4/] Ms. Kanode neither pleaded nor proved malice.[5/] On its face, the letter is a measured, temperate recitation of an essential fact that the policyholders needed to know, to wit: that Ms. Kanode was no longer an agent for the Farmers entities. It disparaged neither Ms. Kanode nor her professional abilities. There is *no* evidence that the letter had any ulterior purpose.

4. Ms. Kanode claimed that the Farmers entities acted somehow wrongfully by not allowing her to extract policyholders' telephone numbers from the Farmers entities' files after the files were returned to the Farmers

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[4/] *Warfield v. Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 660-661 [notice published in club's newsletter informing club members that plaintiff's membership had been terminated was a privileged communication by an interested party (the club) to interested parties (club members)]; *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846 [employer's communication to its current employees about the circumstances of former employee's termination was privileged because facts surrounding plaintiff's forced retirement were disseminated in an effort to preserve employee morale, and recipients of such information as well as defendant employer were "interested persons"].

[5/] See *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1211-1212 [party opposing privilege bears burden of proving malice].

entities by court order. (AOB 20.) But, *the contract* is what gave the Farmers entities the right to possession of the files. (See AA 22.)

Moreover, Ms. Kanode had exclusive physical possession of the Farmers files for *six months* after her termination. Thus, she had ample opportunity to remove any non-Farmers documents she had co-mingled in the files.

Finally, obtaining and enforcing the court order (which expressly *precluded* Ms. Kanode from having access to the files after their return [see Exhibit 133]) is absolutely privileged. (Civ. Code, § 47, subd. (b); see also *Brown v. Kennard* (2001) 94 Cal.App.4th 40 [litigation privilege extends to obtaining and carrying outs directed by writ of execution].)

In sum, Ms. Kanode's interference claim has no merit given the complete absence of evidence of any independently wrongful conduct.

4. There is no evidence that any non-Farmers business, in fact, was disrupted by anything the Farmers entities did.

Even if Ms. Kanode had presented evidence of an intentional attempt to interfere with some specific non-Farmers business by some independently wrongful conduct, she failed to proffer any evidence that any such business was, in fact, disrupted by anything the Farmers entities did.

To the contrary, given her adjudicated mental incapacity and involuntary commitment, she could not have written insurance after her termination. Although she maintained some appointments with other

insurers after her termination (she admitted she let some of those appointments lapse [RT 2395]), she failed to pursue a career as an insurance agent because of changes in her life circumstances. (RT 2394-2398.) The Farmers entities did not interfere with her prospective non-Farmers business. Her "life circumstances" did.

5. There is no evidence of any damage beyond contract amounts that may have been owed; any interference damages, thus, were speculative.

Another independently fatal defect in the interference award is that there is *no* evidence of the damages *caused by* the Farmers entities' alleged interference. (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 522, 529-530 [without substantial evidence of the amount of tort damages, the interference verdict cannot stand].)

As the trial court noted, the jury's economic tort award simply reiterated the amount it found as to *contract* damages for the *Farmers entities' business*. (AA 319.) Ms. Kanode conceded that the interference verdict's economic damages award duplicated the contract award. (RT 3774-3775, 3837-3838.) Her attorney told the jury that the only damages the interference award added were those for emotional distress. (RT 3774-3775 [if Ms. Kanode "win[s] on contract, all she should get on this cause of action (interference) is mental suffering. That doesn't overlap the contract"].) Thus, there can be no separate interference damages here.

Since Ms. Kanode bore the burden of proving her loss, her failure to establish damages dooms her interference claim. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 330 [one of the elements a plaintiff must establish for tort of intentional interference with prospective economic advantage is "damages to the plaintiff proximately caused by the acts of the defendant"].)

Ms. Kanode presented *no* evidence of the existence or value of the non-Farmers business she conducted with policyholders, either before or after the Farmers entities terminated their relationship with her. As the trial court noted: "I don't recall hearing names of clients, the nature of the policies, other than Farmers policies, [or] the dollar amounts." (RT 3913-3914.) Ms. Kanode certainly cites none in her opening brief. And, she never proffered evidence regarding the extent to which Farmers' independently wrongful acts interfered with such relationships.

There is simply no basis for the interference verdict.

D. The Trial Court Properly Determined That Recovery For Emotional Distress Is Not Allowed Where, As Here, The Tortious Conduct Results In Injury Only To A Party's Economic Interests.

Even if Ms. Kanode's interference claim had merit, the trial court correctly concluded that the emotional distress award could not stand because "recovery for emotional distress damages is generally not allowed where the tortious conduct results in injury only to a plaintiff's economic

interests." (*Farmers Ins. Exchange v. Superior Court* (2000) 79 Cal.App.4th 1400, 1407, fn. 5, citing *Erlich v. Menezes*, *supra*, 21 Cal.4th at pp. 554-555 [even if spoliation of evidence tort existed, emotional distress damages would not be recoverable]; AA 319 [court order re: emotional distress damages].)

The Supreme Court has explained that emotional distress damages are not recoverable for the loss of an economic opportunity:

> "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by [that breach of the independent duty]. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests."

(*Erlich, supra,* 21 Cal.4th at p. 555; see also *id.* at pp. 557-558 [negligent breach of contract could not support emotional damages where "the emotional suffering still derives from an inherently economic concern"].) Numerous cases echo the Supreme Court's holding.[6]

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[6] See, e.g., *Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689, 1691 [emotional distress damages are not recoverable when attorney malpractice leads only to economic loss]; *Farmers Ins. Exchange, supra,* 79 Cal.App.4th at p. 1407, fn. 5 ["recovery for emotional distress damages is generally not allowed where the tortious conduct results in injury only to a plaintiff's economic interests"]; *Mercado v. Leong* (1996) 43 Cal.App.4th 317, 324 [emotional distress damages are unlikely when the interests affected are merely economic]; *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 777 ["As for the emotional distress allegedly suffered by plaintiff Navellier, 'damages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California'"]; *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 188 [damages for mental suffering and emotional distress are generally not recoverable in action for breach of

Here, as to both the contract claim and the interference claim, Ms. Kanode alleged only the loss of *income*, pure economic loss, and injury to a purely economic interest.[7] Her relationship with the Farmers entities and with non-Farmers customers was a purely economic one. Accordingly, the emotional distress damages were properly stricken.

Ms. Kanode cites five cases as compelling a contrary result. They do no such thing. Here's why:

First, all five cases predate *Erlich*. (AOB 21, fns. 52-54.) Ms. Kanode fails to even mention *Erlich*, despite the fact that it is binding, Supreme Court authority.[8]

Second, not one of the cases Ms. Kanode cites holds—let alone suggests—that emotional distress damages are appropriate here. Not one even involved an award of emotional distress damages based on a claim for

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ordinary commercial contract in California].

[7] As a matter of law, an agent's remedy for wrongful termination is damages, as in any other breach of contract action. (See *Woolley v. Embassy Suites, Inc*. (1991) 227 Cal.App.3d 1520, 1530; *Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal.2d 158, 174; *Stoll v. Stoll* (1936) 5 Cal.2d 687, 691-693.) Even if the principal breaches a contractual condition and interferes with the subject of the agent's contract, the remedy is *lost profits*. (See *Hacker etc. Co. v. Chapman Valve Mfg. Co.* (1936) 17 Cal.App.2d 265, 267-268.)

[8] Again, the failure to cite *Erlich* is not likely an oversight as it was a centerpiece of the argument in the trial court (AA 187; see also RT 103, 110) and forms the basis for the trial court's order granting judgment notwithstanding the verdict (AA 319 [emotional distress damages "cannot stand as a matter of law because 'the defendant's tortious conduct has resulted only in economic injury to the plaintiff'"; citing *Erlich v. Menezes*, *supra*, 21 Cal.4th at p. 555]).

interference with prospective economic advantage or breach of an agency agreement.[9]

Third, two of Ms. Kanode's cases *affirm* that no emotional distress damages are available in cases like the present one. *Di Loreto v. Shumake*, *supra*, 38 Cal.App.4th 35, holds that "emotional distress damages are not routinely recoverable for interference with prospective economic advantage or with contractual relations," the exact claims Ms. Kanode pursued here. (*Id*. at p. 38.)[10] Likewise, *Merenda v. Superior Court*, *supra*, 3 Cal.App.4th 1, concludes that "plaintiff cannot recover damages for emotional distress suffered as a result of defendants' negligent legal malpractice" in a civil case because "[w]here the interest of the client is economic, serious emotional distress is not an inevitable consequence of the loss of money

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[9] See *Holliday v. Jones* (1989) 215 Cal.App.3d 102, 115 [legal malpractice resulting in incarceration could support emotional distress damages]; *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 718 [legal malpractice causing plaintiff to "live[] on the edge of a financial volcano" for five years could support emotional distress damages]; *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 6 ["garden variety claim of legal malpractice" insufficient to support emotional distress damages], disapproved on another ground in *Ferguson v. Leiff, Cabraser, Heinmann & Bernstein* (2003) 30 Cal.4th 1037, 1053; *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397-398 [bad faith denial of insurance coverage coupled with threatening letters intended to make plaintiff surrender his policy could support emotional distress damages]; *Di Loreto v. Shumake* (1995) 38 Cal.App.4th 35 [no emotional distress damages available because action was to recover an attorney fee earned by plaintiff and his loss was strictly economic].

[10] The page of the *Di Loreto* opinion Ms. Kanode purports to cite (see AOB 21, fn. 52, citing *Di Loreto, supra*, 38 Cal.App.4th at p. 45), does not exist. (See *Di Loreto, supra*, 38 Cal.App.4th 35 [last page of opinion is page 42].)

and, as noted, the precedents run strongly against recovery." (*Id*. at pp. 5, 10.) That is exactly the case here.

Fourth, Ms. Kanode's other cited cases confirm that—pre-*Erlich*—emotional distress damages were only appropriate in extreme circumstances, where there is more than an economic interest at stake, for example, where the *purpose* of the parties' relationship was to provide peace of mind. (E.g., *Fletcher v. Western National Life Ins. Co.*, *supra*, 10 Cal.App.3d at 376 [emotional distress damages allowed in insurance bad faith action because the object of insurance is to provide peace of mind]; *Holliday v. Jones*, *supra*, 215 Cal.App.3d at p. 117 [criminal defense attorney could be liable to client for emotional distress damages where his incompetence caused the client to be convicted and incarcerated; held, representation of the accused involved more than economic or property interests, it encompassed the plaintiff's liberty interest].)

That is not our case. Unlike in *Fletcher*, the Farmers entities are not being sued in their capacity as insurers. Rather, they have been sued in their capacities as principal in an independent contractor relationship.

This is a case about a business transaction. A principal retained an agent to promote and service its business. The object of the agreement was *purely economic*. Thus, as the trial court correctly concluded, no emotional distress damages are available.

IV. THE TRIAL COURT ACTED WELL WITHIN ITS BROAD DISCRETION IN GRANTING A NEW TRIAL AS TO THE CONTRACT CLAIM

The jury awarded Ms. Kanode $268,125 in contract damages, an amount equivalent to well over three years' worth of commission revenues (i.e., covering the period between the termination and the verdict). It did so despite the fact that the Agent Appointment Agreement plainly allowed *either* party to terminate *without cause* on 90 days notice.

In essence, the jury's verdict reflects a view that Ms. Kanode was entitled to retain her agency for years despite her mental instability and involuntary commitment and regardless of the Farmers entities' wishes. Alternatively, the jury's verdict reflects a view that Ms. Kanode's agency agreement could not be terminated unless and until she showed up at a termination review board hearing, even though that hearing was advisory only and was cancelled because her counsel could not provide any assurance as to when she might be mentally competent to appear. (See, e.g., AOB 34, 38.)

On new trial motion, the trial court has broad discretion to weigh the evidence and inferences. It unmistakably concluded that the $268,125 awarded by the jury was excessive. It could quite rationally so conclude and therefore did not abuse its discretion by granting a new trial.

The trial court's grant of a new trial is further justified by instructional errors that the trial court presumptively also relied upon.

A. The Trial Court Had Broad Discretion To Independently Conclude That The $268,125 Contract Damage Award Was Excessive.

A trial court has broad discretion to grant a new trial whenever it is "convinced from the entire record . . . that [a reasonable] jury clearly should have reached a different verdict." (Code Civ. Proc. § 657; *Valdez v. J.D. Diffenbaugh Co.* (1975) 51 Cal.App.3d 494, 512 [court "*should* grant a new trial if the jury's verdict appears to be against the weight of the evidence," emphasis added].)

In ruling on a new trial motion, the trial court "'sits . . . as an independent trier of fact.'" (*Lane v. Hughes Aircraft Co, supra,* 22 Cal.4th at p. 412, quoting *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 933.) It "is not bound by the factual resolutions made by the jury." (*Candido v. Huitt* (1984) 151 Cal.App.3d 918, 923.) It may "disbelieve witnesses, reweigh evidence and draw reasonable inferences contrary to that of the jury." (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 751.)

The trial court's grant of a new trial must be affirmed absent an abuse of discretion. (*Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452.) The order may not be reversed unless "there is *no* substantial basis in the record for any of [its] reasons." (Code Civ. Proc., § 657, emphasis added.) "'[T]he trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual

determinations.'" (*Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1126, disapproved on another ground in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15.) "[A]ll presumptions [are made] in favor of the order as against the verdict . . . ." (*Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1323; accord *Lane v. Hughes Aircraft, Co.*, *supra*, 22 Cal.4th at p. 412.) "'[S]o long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, [it] will not be set aside.'" (*Styne v. Stevens* (2001) 26 Cal.4th 42, 60.)

As we now discuss, under this applicable standard of review, the record amply supports the trial court's view that a new trial was necessary.

B. The Trial Court Did Not Abuse Its Discretion In Determining That The Contract Damages Were Excessive.

The trial court determined that the $268,125 damage award was excessive for at least two reasons: (1) it placed plaintiff in a better position than if there had been no breach because the Agreement allowed the Farmers entities to terminate *without cause* by paying only 90 days commissions plus contract value, and (2) the lack of a TRB hearing did not negate the termination. Both reasons are fully supported by substantial evidence in the record.

1. Substantial evidence supports the trial court's view that Ms. Kanode's damages should not have exceeded her anticipated revenues had the Agreement been terminated without cause.

The trial court rationally concluded that reasonable damages should not exceed 90 days' income. The Agreement could be terminated by either party at any time upon 90 days' notice. (AA 20.) Thus, the *maximum* that an agent could ever assume she was guaranteed under the Agreement was 90 days' income (plus certain liquidated amounts discussed at pp. 53-54, *infra*). That is the greatest lost benefit of the bargain that could be proximately caused by any breach.

"Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promissor performed the contract." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 603; see Civ. Code, § 3358 ["no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides"]; *Avery v. Fredericksen & WestBrook* (1944) 67 Cal.App.2d 334, 336 [same].)

Thus, the rule in California (and across the country) is that where a contract is terminable without cause upon a certain amount of notice, damages are limited to those suffered during the termination period. (*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 407-411 [surveying California cases]; see *Sierra Wine and Liquor Co. v. Heublein, Inc*. (9th Cir. 1980) 626 F.2d 129, 132 & fn. 2 [where contract terminable on "reasonable" notice, plaintiff only entitled to lost profits for a "reasonable" notice period].)

Martin v. U-Haul Co. of Fresno, *supra*, 204 Cal.App.3d 396, is directly on point. There, plaintiff had a U-Haul dealership. He claimed, and the jury found, that U-Haul's supposed for-cause termination of his dealership could not be justified. His agreement with U-Haul, however, allowed termination *without* cause upon 30-days notice. That termination-on-notice provision limited plaintiff's breach of contract damages to the 30-day notice period:

> Because of the 30-day notice provision neither party to the dealership contract could reasonably anticipate that damages resulting from a breach of that contract would exceed those potentially accruing during a 30-day period after the breach. Furthermore, awarding the wronged party damages which exceed those attributable to the 30 days immediately following the breach would place that party in a better position than that resulting if the breaching party had performed in accordance with the terms of the agreement. Therefore, the trial court was correct when it granted the new trial motion conditioned upon Martin's consent to a reduction in the damage award from $29,000 to $725 [30-days lost profits].

(204 Cal.App.3d at pp. 410-411; accord *Jewell v. Colonial Theater Co.* (1910) 12 Cal.App. 681, 683-684 [damages for actress summarily fired with contract providing for termination without cause upon two weeks written notice, limited to two weeks earnings].)

As *Martin* explained: "The specific rule that a termination clause limits recoverable damages to the notice period is consistent with the general requirement that contract damages are limited to those foreseeable by the parties at the time of contracting. Parties who agree that a contract may be terminated for any reason, or no reason, upon the giving of the

specified notice could not reasonably anticipate that damages could exceed that notice period." (*Martin, supra,* 204 Cal.App.3d at p. 409.)

Here, the trial court could quite rationally conclude that damages should be limited to those suffered in the three-month notice period. It does not matter whether such a conclusion was legally compelled (as the Farmers entities believe it was). For new trial purposes, the trial court was well within reason to determine that as a factual matter, reasonable contract damages should not exceed those available for the no-cause termination period, especially in light of the fact that Ms. Kanode was admittedly under a court-ordered conservatorship and incapable of continuing to perform her contract.

There is no dispute that the $268,125 the jury awarded greatly exceeds three months' or even three years' revenue. The trial court did not abuse its discretion in determining that contract damages were excessive.

2. The trial court did not abuse its discretion in determining that no damage could have resulted from not having a Termination Review Board hearing.

The only way to justify the $268,125 contract award was to assume that the contract could not be terminated without a TRB hearing. Indeed, that is what Ms. Kanode argued below and still argues on appeal. (RT 3768-3769; AOB 34.) The trial court justifiably rejected that theory:

First, although a terminated agent may appeal her termination at a TRB hearing, terminations are *effective immediately* upon initial notice. (See pp. 58-59, *infra*.) The trial court observed that any other result defied not only the "unambiguous language" of the parties' agreement, but logic itself: Ms. Kanode's interpretation of the contract "would lead to absurd results. For example, an agent could be terminated immediately for embezzlement of money belonging to Farmers, but Farmers would be required to let him continue to operate as its agent for a period of several weeks, until Farmers' CEO and staff uphold the recommendation of the review board." (AA 320.)

Second, a TRB hearing expressly is *advisory* only; its recommendations regarding reinstatement of terminated agents are not binding. (RT 1409-1410, 1461-1463, 1506, 1512-1513; AA 20.) Reviewing this exact TRB procedure, *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 269, expressly so held: "[T]he review board had no authority to render a final and binding decision—it merely submitted its recommendation to the Executive Home Office." Thus, the trial court could reasonably conclude that the absence of a TRB hearing could have no causative effect.

Third, there was substantial evidence that the termination review board does *not* review whether the Farmers entities had good cause to terminate. Rather, the purpose of the hearing is simply to determine whether the Farmers entities followed their own policies and procedures.

(RT 1409, 2928-2929, 3073.) In light of the extensive testimony that the Farmers entities did so (see, e.g., RT 1738-1739, 3016, 3045), the trial court could reasonably conclude that a TRB hearing would not have changed the result.

Fourth, substantial evidence supports the trial court's conclusion that a TRB hearing would not have availed Ms. Kanode in this instance. Both before and after her termination, Ms. Kanode was under *court-ordered conservatorship*. Even had a hearing taken place, a reinstatement recommendation, let alone acceptance of such a recommendation by the Farmers entities, was unlikely in the extreme. (See Civ. Code, § 3532 [the law does not require idle acts].)

Fifth, substantial evidence supports the trial court's factual finding that the Farmers entities reasonably afforded Ms. Kanode access to the TRB procedure and that her TRB hearing was cancelled only after her counsel could not assure that she would be available for the hearing due to her hospitalization and could not provide any projected date upon which she would be available. (CRT 1394-1398, 1416, 1496-1497, 1521; Exhibits 77, 78, 82.) Ms. Kanode can't complain about the absence of a TRB hearing that she prevented from taking place and could not commit to attending.

In sum, substantial evidence supports the trial court's determination that the absence of a TRB hearing could not be used to multiply Ms. Kanode's contract damages year after year.

C. Prejudicial Instructional Errors Also Support The New Trial Order.

Excessive damages may have been the only ground that the trial court identified in its order granting a new trial, but it is not the only ground requiring affirmance of that order. Except as to excessive damages and insufficient evidence grounds, a new trial order "'shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons.'" (*Maher v. Saad*, *supra*, 82 Cal.App.4th at p. 1323, quoting Code Civ. Proc., § 657; *Hand Electronics, Inc. v. Snowline Joint Unified School Dist*. (1994) 21 Cal.App.4th 862, 870-871 [trial court may grant new trial motion on basis of any ground listed in notice of intent to move for new trial].)

The notice of intention to move for a new trial here specifically identified errors in law as an alternative ground for a new trial. (AA 62; see *Hand Electronics*, *supra*, 21 Cal.App.4th at pp. 870-871 [listing in notice suffices, particular error need not have been argued to justify trial court's new trial order].)[11/] Failure to properly instruct the jury constitutes such an "error in law." (*Gonsalves v. Petaluma Bldg. Materials Co.* (1960) 181 Cal.App.2d 320, 335, internal quotation marks omitted ["it is well settled that erroneous instructions or refusal to give an instruction are errors of law"].)

[11/] In their new trial motion, the Farmers entities clearly argued the substance of the legal errors involved in the defective or omitted instructions. (See AA 105-114.)

Principles of waiver and estoppel do not apply; even "invited" instructional errors justify a trial court's grant of a new trial. (*Hand Electronics, supra*, 21 Cal.App.4th at p. 871.) "When a new trial was granted on the basis [express or implied] of an erroneous instruction, the order 'will not be disturbed unless the questioned instruction was absolutely accurate and under no reasonable circumstances could possibly have misled or confused the jury.'" (*Ibid*.)

Here, instructional errors that the trial court presumptively found include:

(1) Misinstructing the jury that a TRB hearing could be a precondition to termination of the Agreement;

(2) Failing to instruct the jury that Ms. Kanode's acceptance of the contract value could satisfy, wholly or partially, any contract breach; and

(3) Failing to instruct the jury that Ms. Kanode's legally-declared incapacity and commensurate inability to write new policies, as a matter of law, prevented her contract performance during her conservatorship or incapacity.

As we now discuss, each of these instructional failings independently justifies the new trial order.

1. The trial court expressly found that termination of the Agreement was not conditioned upon a TRB hearing. (AA 320.) There is no other way to read the contract. It unambiguously provides for

termination by three methods—immediately, on 30-days' notice or on 90-days' notice. (AA 20.) The TRB proceeding expressly is advisory only. (AA 20; see also RT 1409-1410, 1422, 1461-1463, 1477, 1506, 1512-1513.) It is a mechanism for a *post*-termination recommendation that the Farmers entities reconsider. (*Ibid*.) It is no more binding than a trial court's recommendation that an appellate court consider a writ petition. (*Saeta v. Superior Court*, *supra*, 117 Cal.App.4th at pp. 268-269 [TRB hearing is not equivalent to binding arbitration]; see Code Civ. Proc., § 166.1.)

Yet, the trial court instructed the jury that it could determine that a TRB hearing was a *condition* to terminating the contract. (RT 3716.) That was a legal error that alone justified a new trial.

2. The Agreement provides for payment of a "contract value" to the agent in the event of termination of the agency. This contract value *compensates* for the termination. It functions as a liquidated surrogate for loss of income from the termination. (See *Parker v. C.I.R.* (U.S. Tax Ct. 2002) 84 T.C.M. (CCH) 649 [2002 WL 31818019]; *Clark v. C.I.R.* (U.S. Tax Ct. 1994) 67 T.C.M. (CCH) 3105 [1994 WL 263688] ["contract value" payments upon termination of a Farmers entities agency agreement constitute ordinary income and not capital gains from the sale of property].) It is in the nature of a liquidated payment for any future lost profits occasioned by termination.[12/]

[12/] See Civ. Code, § 1671 ["the parties to . . . a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof"]; *Merrill v. Continental Assurance Co.* (1962) 200 Cal.App.2d 663, 670 ["Parties to a contract may provide

Wallis v. Farmers Group, Inc. (1990) 220 Cal.App.3d 718, 739-740, is on point, holding that the "contract value" sets the limit of reasonable compensatory damages for breach of a Farmers entities' agency agreement. (See Civ. Code, § 3358 ["no person can recover a greater amount in damages for the breach of an obligation than he could if there had been full performance"]; RT 3666 [refusing to instruct on Civil Code section 3358].)

Here, it is *undisputed* that the Farmers entities paid—and Ms. Kanode accepted—$42,712 as the "contract value" liquidated compensation set in the Agreement. (RT 2550-2551, 2597, 2600 [Kanode concedes she cashed the contract value checks].) That payment arguably *fully* satisfied *all* contract obligations or damages. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 801, p. 723 [party with knowledge of a breach *waives* that breach where it accepts further performance under the contract by the breaching party].) At a minimum, it could offset such damages. But the trial court nowhere instructed the jury that payment and acceptance of contract value could wholly or partially satisfy the contract and substitute for termination damages. That, too, was legal error.

3. It is undisputed that Ms. Kanode was under conservatorship by January 11, 2000 and therefore incapacitated from selling new policies to generate "new business" commissions or from servicing existing policies. By her own admission, her "life took a little bit of a turn" and caused her to get out of the insurance agent business. (RT 2387.) Yet nowhere was the

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therein for their respective rights and liabilities in the event of the termination thereof"].

jury instructed that Ms. Kanode's inability to perform or her future inability to perform under the Agreement was a limit on damages.

Both together and independently, each of these instructional errors in law, was prejudicial. The undisputed or overwhelming evidence was that (1) the TRB process was advisory only, (2) Ms. Kanode was paid and accepted a substantial contractually-set "contract value" for the loss of future income from her agency, and (3) due to her mental incapacity, she could not have continued to perform under the Agreement. These critical instructional errors more than justify the new trial order.

D. Ms. Kanode's Attempts To Undermine The New Trial Order Are Baseless.

Ms. Kanode launches two procedural salvos against the new trial order. Neither has merit.

First, she claims that the new trial order is a disguised judgment notwithstanding the verdict order and must be judged therefore by a stricter standard. It is not.

Second, she claims that new trial is inappropriate because there is contradictory evidence supporting her position. But that is the wrong standard of review for a new trial order.

1. The trial court's order expressly was for a new trial, not judgment notwithstanding the verdict.

Ms. Kanode argues that because the trial court's new trial order relies, in part, on its interpretation of the Agent Appointment Agreement, it

is actually a judgment notwithstanding the verdict. (AOB 22-23.) To the contrary, the trial court expressly exercised its new trial function, taking into account its right "'to disbelieve witnesses, reweigh evidence and draw reasonable inferences contrary to that of the jury.'" (AA 320, quoting *Fountain Valley, supra*, 67 Cal.App.4th at p. 751.) On its face, the order grants a *new trial*, not judgment notwithstanding the verdict as to the contract claim. The governing legal standard necessarily impacts any new trial order. (See *Wallis, supra,* 220 Cal.App.3d 718 [excessive damages based on contract interpretation].) That doesn't make a new trial order into one for judgment notwithstanding the verdict.

2. Ms. Kanode cannot rely on supposed "contradictory evidence" to attack the new trial order.

As discussed above, the new trial order must be affirmed if any substantial evidence in the record supports the trial court's factual view. As our Supreme Court explained, "[a]n abuse of discretion [warranting reversal of a new trial order] cannot be found in cases in which the evidence is in conflict." (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal.4th at p. 416.)

Nonetheless, Ms. Kanode attacks the new trial order by reciting—often without any record citations or explanation—a list of "contradictory evidence" that the trial court supposedly ignored. Under governing law, the trial court was entitled to disregard Ms. Kanode's

evidence in favor of other countervailing evidence. (*Id*. at pp. 412, 416; see also pp. 44-45, *supra*.)

For example, the trial court was entitled to credit the evidence (and case law) establishing that a TRB hearing is, at most, akin to discretionary review, rather than a prerequisite to a termination taking effect. (See, e.g., RT 1409-1410, 1506; *Saeta v. Superior Court*, *supra*, 117 Cal.App.4th at pp. 268-269.) Likewise, the trial court could properly believe district manager Jessup's testimony regarding Ms. Kanode's bizarre behavior (see pp. 7-8, *supra*), rather than Ms. Kanode's and Ms. Kanode's mother's flat denial or lack of memory about any of these events.[13/]

In any event, there is no merit to Ms. Kanode's list of supposed "contradictory evidence":

First, Ms. Kanode claims that "Farmers' policies and procedures" supposedly gave her the right to recover more than her expectancy under the Agreement. (AOB 23.) What policies? What procedures? She doesn't say. In fact, no conceivable Farmers agent policy permits a terminated agent to receive sales commissions for three and a half years *after* her termination, in contravention of the Agreement's express termination provisions. (See *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 340, fn. 10 [express contract termination provisions cannot be overcome by implied understandings].) Certainly no policy or procedure suggested that

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[13/] When questioned about what led her to seek conservatorships over her daughter, Ms. Kanode's mother either said she didn't remember or reverted to reciting the words to "What I Did For Love." (RT 2698-2699, 2706-2708.)

the Farmers entities had to maintain agents who had been placed under conservatorship and were no longer capable of performing their contracts.

Second, Ms. Kanode asserts "[t]he contract is silent about when the time for calculation [of the effective termination date] begins." (AOB 23.) This is incorrect. The Agreement unequivocally states that it "may be terminated [without cause] by either the Agent or the Companies on three (3) months written notice." (AA 20.)

Third, Ms. Kanode asserts that Farmers' Director Of Agencies, Mark Petersen, testified "that until completion of the TRB, Farmers cannot terminate the contract (and therefor[e] damages would continue to amass in Ms. Kanode's favor)." (AOB 23-24.) This is not what Mr. Petersen said. Rather, he testified that while a termination was not "finalized" before a TRB hearing occurred, the purpose of the TRB hearing was simply for the "home office" to "make its recommendation to the field." (RT 2085-2087.) He noted that an agent's request for a TRB hearing was something that happened after "the execution of the termination" had taken place. (RT 2087; see also RT 2083 [the TRB hearing "gives the agent the opportunity to have a formal review of the termination"].)

Other witnesses also explained that a TRB hearing *was not* a prerequisite to termination. (RT 1422, 1477, 3078-3081.) Rather, the TRB hearing served only as a means whereby an agent could request review of an *already existing* termination. (RT 1409-1410, 1461-1462, 1506, 1512-1513.) The termination itself was immediately effective. (*Ibid*.)

And this is what the Agreement's plain language states: "In the event this Agreement *is terminated by the Companies*, the Agent may within ten (10) days of receiving the notice of termination request *a review of the termination* by the termination review board." (AA 20, emphasis added.) In other words, the TRB hearing is simply a discretionary process whereby a terminated agent can ask the Farmers to revisit and reconsider a decision *it has already made* and *which is already effective*. It is akin to a motion to reconsider or a new trial motion—i.e., an order or judgment has been entered and is immediately effective (and enforceable), despite the fact that a means exists whereby an aggrieved party may request review.

Ample testimony confirms that this is the only appropriate characterization of a TRB hearing. (See, e.g., RT 998 [testimony by district marketing manager, Corey Braun, the person who signed the termination notice: effective date of termination was "January 26, 2000" because "that was the date we issued Ms. Kanode the notice in my letter, [which] lists the termination date as January 26, 2000"]; 2922 [testimony by the person who handled the termination for Farmers, agency development manager, Bernard Schultz (RT 2911): Ms. Kanode's termination was "effective" on the date the termination notice was sent to her]; see also RT 3077-3080 [termination was effective immediately, regardless of whether TRB hearing occurs].)

Even Ms. Kanode herself testified that she understood her termination to have been effective on January 26, 2000. (RT 2379 [Ms. Kanode understood that her "agency was terminated immediately"

under the January 26, 2000 letter]; see also RT 2144-2145 [Ms. Kanode understood the January 26, 2000 termination letter was “the end” of her agency].)

The trial court was entitled to credit this weight of evidence.

Fourth, Ms. Kanode asserts that Farmers had “no right to declare a termination when Farmers is in breach.” (AOB 24.) Her reasoning is circular. The Farmers entities’ supposed breach was that they terminated the Agreement! In any event, Ms. Kanode’s assertion is contradicted by the Agreement’s at-will termination provision, which states that the contract “may be terminated by either the Agent or the Companies on three (3) months written notice.” (AA 20.) Period.

Fifth, Ms. Kanode argues that her damages “are readily ascertainable making the provision in the contract an illegal penalty.” (AOB 24.) Presumably, Ms. Kanode is talking about the “contract value” provision, which acts as liquidated compensation for future income. Assuming that is the case, there is nothing unenforceable about the provision. At the time relevant time, when the parties executed the Agreement, Ms. Kanode’s damages *were not* ascertainable because no one knew what her income would be or how long she would be an agent. (See Civ. Code, § 1671, subd. (b) [reasonableness of liquidated damages provision determined “under the circumstances that existed at the time the contract was made”].) That’s exactly the circumstance where liquidated damages are in order.

The trial court was free to disregard Ms. Kanode's supposed contrary evidence in granting a new trial.

E. The Trial Court Properly Granted A New Trial As To Both Liability And Damages.

Ms. Kanode suggests that if there is to be a new trial, it should be on contract damages only. (AOB 23.) Not so. The trial court ordered a complete new trial on *all* contract issues. (AA 320-321.)

A trial court has broad discretion to grant a new trial "on all or part of the issues." (See Code Civ. Proc., § 657; *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 285.) Here, the trial court properly granted a new trial as to *both* liability and damages for breach of contract.

The law favors *complete* retrials, even where liability has been "correctly determined." (*Liodas, supra,* 19 Cal.3d at pp. 285-286.) "[E]ven when it appears that the issue of liability was correctly determined, a new trial limited to damages 'should be granted . . . only if it is clear that no injustice will result. . . . [I]t has been held that a request for such a trial should be considered with the utmost caution and that any doubts should be resolved in favor of granting a complete new trial.'" (*Ibid*., internal citation omitted.)

In any event, a complete new trial as to the contract claim is necessary here because the Farmers entities would be prejudiced otherwise. (See *Lauren H. v. Kannappan* (2002) 96 Cal.App.4th 834, 840-842 [where

prejudice would result as the result of a partial new trial, a complete new trial is necessary].)

Here's why:

Ms. Kanode proffered several different acts that she contended constituted a breach of contract, including failing to provide her a TRB hearing, terminating her without cause, and failing to provide her with proper notice of termination. (See RT 3736-3769.) As the trial court recognized, the damage award appeared to have been necessarily premised on a legally *untenable* theory of contract liability—i.e., that Ms. Kanode's contract could *not* be terminated without a TRB hearing:

> In oral argument, when the court indicated its puzzlement regarding the amount which the jury awarded, Ms. Kanode's counsel provided what the court believes to be the most plausible answer—the jury accepted counsel's argument that the trial was, in effect, a termination review board hearing which Ms. Kanode demanded but was not given. The jury then assessed as damages what it believed Ms. Kanode would have earned from the date of termination to the date of verdict.

(AA 320.) As the trial court recognized, "[t]here was no reason in logic or law for the jury to have made this determination, and this court cannot conceive of any other rational basis for the amount of damages which was assessed." (*Ibid*.) In light of the Agency Appointment Agreement's at-will termination clause, and the factual record, contract damages cannot be premised on the absence of a TRB hearing. (*Ibid*.)

Thus, on retrial, before any contract damages can be imposed, a new jury must determine under what *legally tenable* breach of contract theory (if

any) the Farmers entities might be liable. And even if multiple breach-damage theories are available, a new jury would have to choose among them, necessarily having to revisit what breach, if any, occurred. The trial court did not err by granting a complete new trial as to the contract claim.

F. The Trial Court Did Not Abuse Its Exceedingly Broad Discretion In Setting A Remittitur Amount.

Ms. Kanode argues that the trial court erred in calculating the remittitur it offered. (AOB 28-29.) She is wrong. Once again, she completely ignores the applicable standard of review. There was no abuse of the trial court's exceedingly broad discretion here.

1. Review of the trial court's choice of an appropriate remittitur is extremely circumscribed; so long as the trial court exercised independent judgment and determined what it considered to be a fair and reasonable remittitur, its order must be affirmed.

Ms. Kanode argues the remittitur amount set by the trial court is too low. (See AOB 28-29.) However, she doesn't mention the relevant statutory standard of appellate review. Appellate courts have *no authority* to second guess the trial court's exercise of its independent judgment sitting as a trier of fact when selecting an appropriate remittitur. So long as the record reflects that the trial court actually exercised its independent judgment and came to an amount that it subjectively considered to be fair and reasonable, there is nothing for any appellate court to review.

By statute, the Legislature has allotted to the trial court "*in its discretion*" the power to condition denial of a new trial motion on "the party in whose favor the verdict has been rendered consent[ing] to a reduction of so much thereof *as the court in its independent judgment determines from the evidence to be fair and reasonable*." (Code Civ. Proc., § 662.5, emphasis added.) The statute plainly states that it is the trial court, and not any appellate court, which exercises its "independent judgment" and determines for itself what a "fair and reasonable" remittitur amount is. Where, as here, the Legislature has delineated the proper division of authority between trial and appellate courts, especially as regards new trial procedures, the judiciary is powerless to alter it. "'The power of the [L]egislature [in] specifying procedural steps for new trials is exclusive and unlimited . . . . [T]he judiciary, in its interpretation of legislative enactments may not usurp the legislative function by substituting its own ideas for those expressed by the [L]egislature.'" (*Thompson v. Friendly Hills Regional Medical Center* (1999) 71 Cal.App.4th 544, 550, fn. 5, quoting *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 905, fn. 5.)

Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, is on point. There, plaintiff argued that a remitted punitive damages amount was insufficient. The Court rejected plaintiff's attack because although the evidence "might have persuaded a different fact finder that a larger award should have been allowed to stand," the trial judge sits as "an independent

trier of fact" when she selects a remittitur. (*Id*. at p. 823.) *Grimshaw* concluded that the trial court properly weighed the evidence and produced what the trial court decided "was a 'fair and reasonable' award." (*Ibid*.) That was the full extent of the permissible appellate review.

In other words, so long as the trial court exercises independent judgment and reaches a result that *it* subjectively finds to be fair and reasonable, there is nothing for an appellate court to review. Given this standard, Ms. Kanode's argument against the remittitur amount has no merit.

2. The trial court exercised its independent judgment to determine a fair and reasonable amount.

Here, the trial court weighed the evidence and exercised its independent judgment to determine the remittitur amount. (AA 320-321.) It noted that it would be fair to limit the measure of damages for breach of contract to the "amount of money [the breaching party] would have to pay in exercising his election to terminate" without cause and calculated that amount in this case to be $13,334. Thus, in the trial court's honestly held view, contract damages were limited to the amount it set as a remittitur—i.e., $13,334.

Ms. Kanode quibbles with the trial court's calculation. (AOB 29.) But there was no mistake. Ms. Kanode claimed she made $80,000 in commissions each year. (RT 3755, 3768.) This means that, under Ms. Kanode's view, she received an average of $6,667 per month. Her

maximum contract damages, as a matter of law, therefore were $13,334 ($6,667 x 2 months). But even if the trial court miscalculated, that is not subject to appellate review.

The only questions the reviewing court asks are whether the trial court independently reviewed the evidence, exercised its discretion and reached a number it subjectively felt was fair and reasonable. The trial court here undoubtably did. There is nothing more for this Court to review. There was no abuse of discretion here.

CONCLUSION

The trial court correctly concluded that neither the interference verdict nor the contract verdict were legally sustainable. As a matter of law, Ms. Kanode had no claim for interference with prospective economic advantage. Likewise, the court was well within its broad discretion in determining that excessive damages and instructional errors required a new trial on the contract claim. Ms. Kanode has not challenged the dismissal of her other claims.

This Court should affirm the unchallenged dismissal of Ms. Kanode's other claims, as well as the trial court's order granting judgment notwithstanding the verdict on the interference claim. If it does not direct entry of judgment for the Farmers entities on the contract claim on cross appeal, this Court should also affirm the new trial order on the contract claim.

CROSS-APPELLANTS' OPENING BRIEF

INTRODUCTION

As just discussed, the trial court was correct in granting judgment notwithstanding the verdict on the interference claim. It was also well within its discretion in granting a new trial on the contract claim. But it should have gone further. It should have granted judgment notwithstanding the verdict on the contract claim as well. It should have done so because Ms. Kanode, by virtue of her conservatorship and involuntary hospital commitment, was unable, as a matter of law, to perform her personal services contract.

Ms. Kanode was judicially declared to be "gravely disabled." She was subjected to involuntary holds and hospitalizations under Welfare and Institutions Code section 5150. She had conservators appointed to take care of her. Even her own parents affirmed that she could not handle her personal or financial affairs alone. These undisputed facts preclude even retrial of the contract claim. They require reversal of the order denying judgment notwithstanding the verdict as to the contract claim with directions to enter judgment in the Farmers entities' favor on that claim.

The remainder of the Farmers entities' cross appeal is protective only; it need not be considered if this Court affirms the judgment notwithstanding the verdict as to the interference claim and either affirms the new trial as to the contract claim or grants judgment notwithstanding the verdict as to that claim.

Even in the absence of the judgment notwithstanding the verdict or the new trial order, the jury's interference and contract verdicts still could not stand. Prejudicial instructional error infected the contract verdict. The trial court abused its discretion to the extent that it failed to grant a new trial in the alternative as to the interference claim, given its finding that no substantial evidence supported that verdict. In any event, prejudicial instructional error infects the underlying interference verdict; specifically, when the jury expressed confusion regarding what kind of conduct could support intentional interference with prospective economic relations, the trial court failed to tell the jury that breach of contract *would not* suffice.

In sum, this Court should direct entry of judgment in the Farmers entities' favor on the contract claim, as well as the interference claim.

STATEMENT OF ADDITIONAL FACTS

In addition to the facts recited at pp. 5-7, *supra*, the following additional facts are relevant to the Farmers entities' cross-appeal.

A. Multiple Conservatorship Orders Determined That Ms. Kanode Was Legally Incapacitated.

As briefly noted above (pp. 9-10, *supra*), Ms. Kanode was placed under conservatorship numerous times both before and after the termination of her agency. The details of those conservatorships are as follows:

1. The four-month conservatorship in 1997-1998.

Ms. Kanode's parents, Carol and Irwin Kanode, were appointed as Ms. Kanode's conservators for a four-month period between December 1997 and March 1998. (RT 2780.) As Carol Kanode explained, the conservatorship was necessary because her daughter "needed someone to guide her life for awhile." (RT 2782.) Ms. Kanode's parents were "empowered to handle the financial affairs" of Ms. Kanode during the four-months of the conservatorship. (RT 2782-2783.)

2. The January 2000 conservatorship.

In January 2000, proceedings were again initiated to appoint a conservator for Ms. Kanode. (RT 2821-2822.) Ultimately, on January 11, 2000, a public guardian was appointed as Ms. Kanode's temporary conservator. (Exhibit 48.) The conservatorship order gave the conservator the right to "require the conservatee to be detained in a facility providing intensive treatment, or to place the conservatee in a medical, psychiatric, nursing or other state-licensed facility . . . ." (*Ibid.*) The conservator was also empowered to "require the conservatee to receive treatment related specifically to remedying or preventing the recurrence of the conservatee's being gravely disabled." (*Ibid.*)

3. The February 2000 conservatorship.

On February 15, 2000, a public guardian was again appointed as Ms. Kanode's temporary conservator based on a February 2, 2000 medical declaration that Ms. Kanode was gravely disabled. (Exhibits 62, 63.)

Again, the conservatorship order gave the conservator the right to subject Ms. Kanode to involuntary medical treatment and hospitalization to remedy her "being gravely disabled." (Exhibit 63.)

4. The March 2000-2001 conservatorship.

On March 10, 2000, Ms. Kanode's mother was appointed as Ms. Kanode's conservator for a full year. (Exhibit 85.) The court found that Ms. Kanode "is gravely disabled pursuant" to Welfare and Institutions Code section 5008, subd. (H) and ordered the appointment of Ms. Kanode's mother as conservator of Ms. Kanode's "person and estate." (*Ibid*.) The court explained that the genesis of its appointment of a conservator was its investigation of Ms. Kanode's condition and its determination that Ms. Kanode was "gravely disabled as a result of a mental disorder." (Exhibits 93, 94.)[14/]

In addition to the power to require involuntary medical care, the conservatorship order specifically gave the conservator full financial powers, including "[t]he power to contract for the conservatorship and to perform outstanding contracts and thereby bind the estate." (*Ibid*.) The order further provided that Ms. Kanode "shall not have the privilege of possessing a license to operate a motor vehicle, or the right to enter into contracts, or the right to possess and/or carry firearms." (*Ibid*.)

[14/] In a strange reference to Ms. Kanode's district manager (Merrill Jessup), the court noted that Ms. Kanode had used a number of aliases, including "Barbara Jessup." (Exhibit 93.)

Ms. Kanode's mother later explained that when she served as her daughter's conservator in 2000, she attempted to look out for her best interests, including "any obligations that she ha[d] from a financial perspective" and that she understood her conservatorship responsibilities regarding her daughter's contracts as meaning she "would perform outstanding contracts and thereby bind the estate." (RT 2839, 2842.)

B. Ms. Kanode's Failure To Pursue Other Opportunities As An Insurance Agent.

Given her mental disorder, it is not surprising that Ms. Kanode did not pursue other insurance agent opportunities after the Farmers entities terminated their relationship with her. She indisputably had appointments with other insurers and was permitted to sell non-Farmers products to Farmers policyholders. (RT 2394-2395.) She maintained her insurance license and appointments with the other carriers after her termination. (RT 2395-2396.) Nonetheless, she admitted that "life took a little bit of a turn" and caused her to not pursue her career as an insurance agent with other carriers after the Farmers entities terminated the Agent Appointment Agreement. (RT 2387.)

ADDITIONAL PROCEDURAL HISTORY

In addition to the procedural history recited at pp. 15-20, *supra*, the following additional procedural history is relevant to the Farmers entities' cross-appeal.

A. The Trial Court's Instructions Regarding The Interference With Prospective Economic Advantage Claim.

The trial court initially instructed the jury that in order to establish interference with prospective economic advantage, Ms. Kanode had to show that "Farmers engaged in wrongful conduct other than the allegedly wrongful termination of the Agent Appointment Agreement with [Ms.] Kanode." (RT 3720.)

The jury asked the trial court for clarification of the instruction; it asked: "Is there available a further definition of 'wrongful conduct' beyond wrongful termination?" (RT 3845.) The Farmers entities requested that the trial court respond by instructing that the "wrongful conduct" must "be a specified, recognized legal wrong" other than the breach of contract. (RT 3855.)

The trial court declined. (RT 3856.) Instead, it instructed that the "wrongful conduct" must be other than the act of terminating the agency agreement with Ms. Kanode and that it must have "interfered with [Ms. Kanode's] economic relationship with the policyholders who were her customers." (RT 3846, 3856.)

B. Statement Of Appealability.

Judgment was entered on November 17, 2003. (AA 55.) The Farmers entities filed a notice of intent to move for a new trial on December 3, 2003. (AA 61-63.) On January 15, 2004, the trial court

granted in part and denied in part the Farmers entities' motions for a new trial and for judgment notwithstanding the verdict. (AA 318-320.) The trial court entered judgment on March 10, 2004. (RA 37A.) Ms. Kanode timely appealed on March 29, 2004. (AA 344.)

The Farmers entities timely cross-appealed from both the underlying judgment and from the trial court's order denying judgment notwithstanding the verdict as to Ms. Kanode's contract claim three days later, on April 1, 2004. (RA 38 [April 1, 2004 Notice Of Cross-Appeal]; Cal. Rules of Court, rules 2, 3(e).)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE CONTRACT CLAIM.

A. Ms. Kanode's Undisputed Incapacity Terminated The Agency Relationship As A Matter Of Law.

By statute, "[a]n agency is terminated" upon "[t]he incapacity of the agent to act as such." (Civ. Code, § 2355, subd. (e).)

Here, it is undisputed that Ms. Kanode was judicially declared incompetent and had conservators appointed.[15] There can be no surer

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[15] See Exhibit 48 (court order dated January 11, 2000, appointing temporary conservator); Exhibits 62 and 63 (court orders dated February 15, 2000, appointing temporary conservator); Exhibit 85 (order dated March 10, 2000, appointing Carol Kanode as conservator of Ms. Kanode); Exhibit 93 (April 6, 2000, order appointing conservator); Exhibit 94 (letters of

determination of incapacity. (See *Board of Regents v. Davis* (1975) 14 Cal.3d 33, 40 ["when 'a court has regularly adjudged one to be incompetent, he thereby becomes incapable of making a valid contract, and it is deemed to be void, . . . the decree of incompetency is notice to the world of his incapacity to make a valid contract'"]; *Hellman Commercial T. & S. Bk. v. Alden* (1929) 206 Cal. 592, 605 [an adjudication of incompetency presupposes a lack of capacity to understand the nature and effect of a contract]; see also Civ. Code, § 40, subd. (a) ["after his or her incapacity has been judicially determined a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his or her restoration to capacity"].)

Thus, Ms. Kanode's agency agreement was *automatically* terminated by operation of law. This fact alone precludes any liability for breach of contract. The law is clear that when the law operates to terminate an agency, such agency "dissolves" and becomes a nullity. (See *Lovato v. Santa Fe Internat. Corp*. (1984) 151 Cal.App.3d 549, 553 ["When an attorney is suspended his authority to act on behalf of his client terminates by operation of law. (Citation.) As a result the agency relationship dissolves like any agency which is not coupled with an interest"]; *Charles B. Webster Real Estate, supra,* 21 Cal.App.3d at pp. 616-617 ["Death terminates the agency by operation of law, and the authority of the broker to represent the owner in seeking a buyer for the property is ended"; "to the

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conservatorship, dated April 10, 2000).

extent that agency is a consensual relation, it cannot exist after the death or incapacity of the principal or the agent"].)

And, the law is clear that where, as here, the agency terminates by operation of law, the agent's and principal's contractual obligations to each other *end*. *Charles B. Webster Real Estate*, *supra*, 21 Cal.App.3d at p. 614, is on point, presenting the exact obverse situation. There, a seller of real estate contracted with an agent to list his property. The agent assigned the contract. Before the assignee could sell the property, the seller died. When the executor of the seller's estate sold the property, the assignee of the listing agent sought commissions. The Court of Appeal held "that [the] exclusive right to sell listing terminated, by operation of law, upon [the principal's] death, with no contractual liability [owed to the agent] under the agreement devolving upon [the principal's estate]." The principal's death *terminated* all contractual obligations:

> As a consequence of this termination of authority, the broker must be deemed to be relieved of his obligation to perform his covenant of diligence. Absent authority to perform, he cannot be compelled to perform, nor can he be held liable for failure to perform. . . . Mutuality of obligation, which may have existed prior to death, is gone. Stated another way, the death of the owner, by operation of law effects a prospective failure of consideration on the part of the broker which discharges all executory obligations under the contract.

(*Charles B. Webster Real Estate*, *supra*, 21 Cal.App.3d at p. 616.)

Civil Code section 2355 terminates an agency equally upon the death or incapacity of *either* the agent or principal. Thus, upon Ms. Kanode's incapacity, the agency contract ended *as a matter of law* and so did the

Farmers entities' contractual obligations. Simply stated, due to her judicially determined incapacity, Ms. Kanode, as a matter of law, could no longer perform her end of the contract. That, as a matter of law, is a fatal failure of consideration, putting the contract at an end.

This is especially true where, as here, the contract was one for personal services. "[T]he cases are unanimous that an executory contract for personal services involving a personal relation of confidence between the parties, or involving liabilities or duties, which in express terms impute or indicate reliance on the character and personal ability of the parties, cannot be assigned, nor can such a contract be specifically enforced." (*Coykendall v. Jackson* (1936) 17 Cal.App.2d 729, 731.) Upon the incapacity of the contracting party, the personal services contract *terminates*. (See *Carver v. Fitzsimmons* (1935) 5 Cal.App.2d 320, 325 [where "promise to render personal services lies at the base of the contract," "the contract ends with the termination of the services, because of death or disability"].)

That is precisely the case here.

The nature of the Agreement necessarily calls for Ms. Kanode's *personal* efforts. Indeed, for at least some aspects of her agency, she had to be *licensed*. Others simply could not perform in her stead.

Ms. Kanode's inability to perform equally negates any damages. Given her judicially-declared incompetence, Ms. Kanode could not have serviced existing policyholders' policies. She could not have sold new

policies. And she could not have bound the Farmers entities to new coverage. Had a TRB hearing taken place, she could not have agreed to reinstatement as an insurance agent. Even if the Agreement were not a non-assignable personal services contract, neither the public guardian nor Ms. Kanode's mother were licensed or qualified insurance agents who could do these things in her stead. Once Ms. Kanode was judicially declared incompetent, there was simply no ongoing, mutual contractual relationship to be enforced.

B. As A Matter Of Law, Ms. Kanode's Indisputable Inability To Perform Her Obligations Under The Agent Appointment Agreement Justified Terminating Her Agency For Cause On 30-Days Notice.

Ms. Kanode's mental instability and indisputable erratic behavior negate the contract claim as a matter of law for a second reason as well: the Farmers entities had ample good cause to terminate the contract on 30 days notice as they did. Having given 30 days notice and having paid 30 days commissions and the contract value as required by the Agreement, if the Farmers entities had good cause justifying a 30-day notice termination, there is no breach of contract.

Here, there was ample such cause. The Agreement expressly required that Ms. Kanode "servic[e] all policyholders of the Companies in such a manner as to advance the interests of the policyholders, the Agent and the Companies." (AA 19.) The *undisputed* evidence here was that

(1) Ms. Kanode had failed to deposit policyholders' checks, (2) she had been involuntarily committed to a hospital because of her psychiatric symptoms and had conservators appointed for her, (3) she had disappeared from her agency for weeks and months at a time, and (4) at least one policyholder—Rick Criner—found Ms. Kanode's behavior so disturbing that it shook his confidence in her abilities as an agent. (RT 2981, 2984.)

In other words, Ms. Kanode, as a matter of law, was not performing and could not perform as a competent insurance agent. The Farmers entities were not required to endanger their policyholders' and their own interests by continuing to retain an incompetent agent. Thus, the Farmers entities had ample good cause to terminate the Agreement under the 30-day notice provisions. "[W]here the consideration fails in whole or in part through the fault of a party whose duty it is to render it, the other party may invoke such failure as a basis for rescinding or terminating the contract." (See *Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 412.)

Any other result is illogical and suggests that the Farmers entities cannot terminate an agent whose behavior posed a danger to their business interests and to the interests of their policyholders whose policies she serviced. Indeed, the Farmers entities could have faced substantial liability for failing to service their policyholders if they had *kept* Ms. Kanode as their agent. There was every possibility that a premium check or claim submitted to Ms. Kanode would not be forwarded to the appropriate carrier, as had already happened.

That Ms. Kanode proffers a medical excuse for her inability to perform (i.e., Graves disease), is of no moment. Regardless of the reason, as a matter of law, she was not performing and could not perform her obligations under the Agreement. Indeed, her attorney admitted as much. Commenting on the Farmers' entities' position that Ms. Kanode "was in no shape to continue the business," he stated: "I don't believe that's a disputed item. My client was hospitalized at the time with Graves. It's been my position that she wasn't in a condition to run the business at that time." (RT 1044.)

The Farmers entities acted well within their rights by terminating her agency for cause. As a matter of law, there was no breach of contract.

C. As A Matter Of Law, Ms. Kanode's Failure To Mitigate Damages Negated Any Contract Claim.

If Ms. Kanode could perform as an insurance agent, there is another indisputably fatal obstacle to her contract claim—as a matter of law, she failed to mitigate damages. Either Ms. Kanode was not competent to perform as an insurance agent, in which case the contract terminated for failure of consideration and the Farmers entities had good cause for a 30-day notice termination, *or* she was competent to act as an insurance agent, in which case, she had to at least attempt to mitigate her supposed damages.

The governing legal standard is that a party claiming injury must take reasonable steps to mitigate damages, that is, "to do everything reasonably possible to negate [her] own loss and thus reduce the damages

for which the other party has become liable." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460.) Ms. Kanode admittedly did not do so here.

Ms. Kanode *admitted* that she did not pursue continuing to act as an agent for other insurance companies. (RT 2387.) She conceded that she continued to be licensed and have appointments to represent such other companies. (RT 2395-2396.) The only reason that she did not pursue that alternative was that, according to Ms. Kanode herself, her life circumstances had changed. (RT 2387.)

But the Farmers entities are *not* responsible for Ms. Kanode's change in life circumstances. There is *no* evidence that they are responsible for her Graves disease. If she could have functioned as an insurance agent, it was her obligation to do so.

Where a party admittedly has other substantial and equivalent possibilities for earning income but simply chooses not to pursue those possibilities, she fails to mitigate damages *as a matter of law*. *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, is directly on point. There, plaintiff claimed that his employer discriminated against him by complying with the demands of a client (the Saudi Arabian government) not to employ him on a project. Thereafter, his employer offered him other comparable projects but he turned them down. The Court of Appeal held that he had failed to mitigate damages *as a matter of law*:

> Whether the plaintiff has acted reasonably in mitigating damages is ordinarily a question of fact [citation], but issues

> of fact become those of law where, as here, the facts are undisputed and permit of only one conclusion [citations]. Since it is indisputable that [the plaintiff employee] was offered comparable, or substantially similar, employment, and he admittedly made no effort whatsoever to pursue such employment, it must be concluded that he failed to mitigate his damages as a matter of law; any other result would ignore the obligation to mitigate.

(*Id*. at p. 985.) And so it is here. It is undisputed that Ms. Kanode had other existing insurance agent relationships with other insurance carriers but that *she* "admittedly made no effort whatsoever to pursue such employment . . . ." (*Ibid.*) If she had the ability to continue to perform as an insurance agent, then as in *West*, "it must be concluded that [she] failed to mitigate [her] damages as a matter of law; any other result would ignore the obligation to mitigate." (*Ibid*.)

For this reason as well, not only did the trial court act correctly in granting a new trial as to the contract claim, but it should have gone further and granted judgment notwithstanding the verdict as to that claim.

* * * * *

The judgment should be reversed to the extent that it permits retrial of the contract claim with directions that judgment be entered in the Farmers entities' favor on that claim.

The remainder of this cross-appeal is protective only. It need not be addressed unless for some reason this Court finds it necessary to reverse the judgment notwithstanding the verdict as to the interference claim or the new trial as to the contract claim.

II. PREJUDICIAL INSTRUCTIONAL ERRORS MEAN THAT THE UNDERLYING CONTRACT JUDGMENT CANNOT STAND IN ANY EVENT.

As just discussed, judgment should be entered in the Farmers entities' favor on the contract claim. If not, the trial court's discretionary grant of a new trial on that claim should be affirmed. (See Respondents' Brief, Section IV, pp. 42-65, *supra*.) If for some reason the new trial order is not affirmed, however, the breach of contract verdict still should not be reinstated.

First, the prejudicial errors described above (pp. 52-55, *supra*) equally compel reversal of the underlying contract verdict, regardless of the trial court's new trial orders. For brevity sake, we will not repeat those errors in full. Those errors included:

(1) misinstructing the jury that a TRB hearing could be a precondition to termination of the Agreement;

(2) failing to instruct the jury that Ms. Kanode's acceptance of the contract value could satisfy, wholly or partially, any contract breach; and

(3) failing to instruct the jury that Ms. Kanode's legally-declared incapacity and commensurate inability to write new policies, as a matter of law, prevented her contract performance.

These errors were clearly prejudicial, going to the heart of Ms. Kanode's claims. Their effect on the jury is established by the grossly

influenced damages award. Individually and cumulatively, these errors alone would require reversal of the contract verdict.

Second, the damages are clearly excessive and are unsupported by the evidence. They can only reflect a hypothesis that Ms. Kanode would have continued to perform under her contract with the Farmers entities even though she had been judicially determined to be mentally incompetent and placed under a conservatorship. They constitute far more than the maximum amount that would have been owed for a contractually allowed termination without cause. And, they fail to take into account the Farmers entities payment of, and Ms. Kanode's acceptance of, the contractually provided contract-value payment. No evidence, expert or otherwise, supports $268,125 in lost profits economic damages to Ms. Kanode in this context.

The underlying judgment as to the contract claim cannot stand.

III. THE TRIAL COURT ERRED TO THE EXTENT THAT IT DENIED AN ALTERNATIVE NEW TRIAL ON THE INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE CLAIM.

As with the contract verdict, there is no basis on which to reinstate the interference verdict or any portion of it. As discussed above, there is no legal or factual basis for the jury's interference verdict and thus, on that claim, judgment notwithstanding the verdict was properly entered.

If, however, this Court disagrees and reverses the order granting judgment notwithstanding the verdict, then the trial court's order granting a new trial (AA 320) becomes effective as to the interference claim. (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 331 ["where both judgment notwithstanding the verdict and a new trial are granted, then the new trial order is contingent upon reversal of the judgment notwithstanding the verdict"]; Code Civ. Proc., § 629 ["If the court grants the motion for judgment notwithstanding the verdict . . . and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed"].)

The Farmers entities sought—and the trial court granted—a new trial as to *both* of Ms. Kanode's claims. (AA 320.) To the extent that order is not reflected in the later order signed by the trial court, that is a ministerial oversight. (RA 37A.) If, however, this Court disagrees and reads the trial court's order as granting a new trial *only* as to the contract claim, then it was an abuse of discretion for the trial court to decline to grant a new trial in the alternative as to the interference claim in light of its finding that no substantial evidence supported that verdict.

Although the trial court exercises broad discretion in determining a new trial motion, that discretion is abused where the record reflects that the trial court has concluded that the substantial weight of the evidence does

not support the verdict, but nonetheless refuses to order a new trial. *Lippold v. Hart* (1969) 274 Cal.App.2d 24, is on point. There, plaintiff sued for the damages she suffered in a car accident. (*Id*. at p. 25.) The jury returned a defense verdict and the plaintiff moved for a new trial. (*Ibid*.) The trial judge felt the verdict was unfair, saying "'That lady [the plaintiff] was definitely entitled to recover something" and that he did not believe some of defendant's testimony. (*Ibid*.) Nonetheless, the trial judge denied the motion for a new trial because "'the jury heard the story. So I've got to abide by it because it was a unanimous verdict.'" (*Ibid*.)

The Court of Appeal reversed, concluding that the trial judge's comments "indicate[d] that he misconceived his duty at the hearing on the motion for new trial." (*Id*. at p. 26.) It explained that it was an abuse of discretion *not* to order a new trial after concluding that the plaintiff should have recovered:

> The trial judge's comments indicate that, although he made an independent evaluation of the evidence, he failed to base his decision on the motion for a new trial upon that evaluation. That was error.

(*Id*. at pp. 25-26.)

The Supreme Court reached the same result in *People v. Robarge* (1953) 41 Cal.2d 628. There, after the defendant was convicted of robbery, the trial judge stated that he disbelieved key testimony against the defendant and he had serious doubts about the witness' identification of the defendant as the robber. (*Id*. at pp. 633-634.) Nonetheless, he denied defendant's new trial motion because he believed himself bound by the jury's verdict if

there was “sufficient evidence” to support it. (*Id*. at p. 634.) The Supreme Court reversed. Because the defendant did not receive “the benefit of [the trial court’s] independent conclusion as to the sufficiency of credible evidence to support the verdict,” the Court vacated the order denying the new trial motion. (*Id*. at p. 634.)

Lippold and *Robarge* control here. The trial judge’s comments plainly reflect his conclusion that the evidence did not support the interference verdict. (See AA 319; RT 3913-3914.) Thus, to the extent Ms. Kanode is correct in arguing that judgment notwithstanding the verdict was inappropriate and could only have been premised on the trial court’s weighing of evidence, at a minimum, a new trial was required and it would have been an abuse of discretion not to grant an alternative new trial.

The trial court’s grant of judgment notwithstanding the verdict in this instance necessarily subsumes the less stringent new trial standard for the absence of evidence, given the trial judge’s power to “disbelieve witnesses, reweigh evidence and draw reasonable inferences *contrary* to that of the jury.” (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 751, emphasis added.)

Because there is no question that the trial judge here found the evidence against the Farmers entities insufficient to support the interference verdict, denying the motion for new trial as to that claim would have been an abuse of discretion. Thus, if this Court reverses the order granting judgment notwithstanding the verdict, it must at a minimum order a new trial as to the interference claim.

IV. PREJUDICIAL INSTRUCTIONAL ERROR ALLOWING THE JURY TO IMPOSE INTERFERENCE LIABILITY FOR BREACH OF CONTRACT WOULD INDEPENDENTLY REQUIRE REVERSAL OF THE UNDERLYING INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE VERDICT.

Finally, even regardless of the post-trial motions, the underlying verdict as to the interference claim cannot be reinstated. All of the reasons supporting judgment notwithstanding the verdict (Respondents' Brief, Section III, pp. 24-42, *supra*) equally independently undermine the interference verdict.

In addition to those reasons, a crucial prejudicial instructional error also infects that verdict: When the jury expressed confusion regarding what sort of conduct could support a finding of intentional interference with prospective economic relations, the trial court fumbled. Despite the Farmers entities' requests that the jury be instructed in response that the "wrongful conduct" must "be a specified, recognized legal wrong" other than a breach of contract (RT 3855), the trial court *never* told the jury that breach of contract could not support an interference verdict.

In the end, the trial court told the jury only that the "wrongful conduct" must be other than the act of terminating the agency agreement with Ms. Kanode and that it must have "interfered with [Ms. Kanode's] economic relationship with the policyholders who were her customers." (RT 3856.) This left open the possibility of tort liability based on breach of

contract alone. The jury never received instruction that the "wrongful act" must be a separate legally-recognized wrong, *other* than breach of contract. As discussed above (Respondents' Brief, Section III, B. & C.3., pp. 26-28, 31-36, *supra*), a legal wrong other than breach of contract is an essential element of an interference claim. The failure to so instruct was error.

The error undoubtably was prejudicial. There is a "reasonable chance, more than an abstract possibility" that defendants would have prevailed on the interference claim, had the trial court properly instructed the jury. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis omitted; *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580 ["Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict'"].) There were a number of clear signs that this was so.

First, the jury's question reflected confusion stemming from its inability to determine where the breach of contract claim ended and where the interference claim began. (See RT 3854 [juror asks: "where does the . . . termination of the contract end, and a separate action start"]; see *Soule, supra*, 8 Cal.4th at p. 580 [jury's question indicative of prejudice].) Although the trial court instructed the jury that *termination* of Ms. Kanode's contract would not suffice to impose interference liability, this instruction appears to have created a negative implication, that *other contractual* conduct could justify an interference verdict. During deliberations, the jury asked for clarification of what could constitute "wrongful conduct,"

resulting in the erroneous instruction. (RT 3845 [“Is there available a further definition of ‘wrongful conduct’ beyond wrongful termination?”].)

Second, as to both the contract claim and the interference claim, the jury awarded Ms. Kanode the *identical* compensatory economic damages. (See p. 17, *supra*.) As Ms. Kanode put on *no* evidence regarding the value of her economic expectancy stemming from her non-Farmers business, the only possible inference is that the jury awarded *tort* interference damages for the Farmers entities’ *contractual* conduct. That is impermissible. There was no possible actionable conduct independent of the contract itself.

In sum, the trial court’s instructional error was prejudicially erroneous because it let the jury to impose interference damages based on breach of contract. At a minimum, that prejudicial error would require a new trial.

CONCLUSION

The trial court should not only have granted a new trial on the contract claim as it did, but it should also have directed entry of judgment on that claim in favor of the Farmers entities. This Court should now direct that result.

As a protective matter only, if this Court were to reverse the existing new trial order as to the contract claim or the existing judgment notwithstanding the verdict as to the interference claim, the underlying verdicts on those claims could not be reinstated as each is fatally infirm.

DATED: April __, 2005

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CERTIFICATION

Pursuant to California Rules of Court, Rule 14, I certify that this **COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' OPENING BRIEF** contains 20,241 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: March 9, 2011

____
Robert A. Olson

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